Supreme Court, U.S.
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No. 99-

In The

Supreme Court of the United States

October Term, 1999

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure apply to post-judgment orders intended to commence the appeal periods defined in Rule 4(a)(1) of the Federal Rules of Appellate Procedure?

PARTIES TO THE PROCEEDING

The parties to this Petition are the same parties who were litigants in the appeal decided by the United States Court of Appeals for the Eighth Circuit. They are listed below with their status as designated during the Eighth Circuit proceedings.

Petitioners

Gilbert Copper (Appellee/Cross-Appellant)
Adele Norberg (Appellee/Cross-Appellant)

Respondents

City of Fargo (Appellant)
Kevin Niemann (Cross-Appellee)
Sherri Arnold (Cross-Appellee)

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Petitioners Gilbert Copper and Adele Norberg respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 184 F.3d 994 (8th Cir. 1999) (App. A).

The opinion of the district court in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. March 31, 1998) on petitioners' motion for attorney's fees is unreported. The opinion of the district court in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. April 10, 1997) on cross-motions for summary judgment prior to the second trial is unreported.

The opinion of the district court on cross-motions for summary judgment entered prior to the first trial is reported at 905 F. Supp. 680 (D.N.D. 1994). The district court's supplemental opinion on municipal liability entered after the first trial is reported at 905 F.Supp. 703 (D.N.D. 1995).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 22, 1999. A timely petition for rehearing was denied on August 24, 1999. (App. B). Original jurisdiction in the district court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Set forth in Appendix C are U.S. Const. Amendment I; U.S. Const. Amendment IV; U.S. Const. Amendment XIV, Section I; 42 U.S.C. § 1983; Rule 4 of the Federal Rules of Appellate Procedure; Rules 54(a) and 58 of the Federal Rules of Civil Procedure; and Fargo Municipal Ordinance 10-08.

STATEMENT OF THE CASE

1. Facts Underlying The Constitutional § 1983 Claims.

On August 20, 1991 Petitioners Gilbert Copper and Adele Norberg were arrested while they were lawfully and peacefully picketing in a residential neighborhood in Fargo, North Dakota. Petitioners were arrested by Respondents Kevin Niemann and Sherri Arnold, two police officers employed by Respondent City of Fargo, who charged Petitioners with violating Fargo's residential picketing ordinance. (App. C at 19-20). The subsequent prosecution against the Petitioners in the state courts of North Dakota resulted in the dismissal of charges on constitutional grounds. The state court judge who dismissed the charges specifically found that the Petitioners had been engaged in constitutionally protected picketing under the holding of *Frisby v. Schultz*, 487 U.S. 474 (1988). On August 18, 1993, Petitioners filed a Complaint in the United States District Court for the District of North Dakota seeking damages against the City of Fargo and police officers Niemann and Arnold pursuant to 42 U.S.C. §1983.

2. First Summary Judgment Decision and First Trial.

The District Court dismissed all claims against Arnold on summary judgment in 1994, but concluded that Petitioners' picketing activities were protected by *Frisby* and that their constitutional rights had been violated. However, the District Court also concluded that a single fact issue remained for trial, the resolution of which would determine (1) whether Niemann was entitled to qualified immunity and (b) whether there was municipal liability under § 1983 for the City of Fargo. In January 1995, the disputed issue of fact was tried to a jury, which decided it in a manner which resulted in a defense verdict in favor of the City but a liability verdict against Niemann. The jury then awarded $1.00 in damages to each of the Petitioners.

3. Motion For A New Trial.

Before entering final judgment on the jury verdict, the District Court concluded that it had given an erroneous jury instruction (over Petitioners' objections) which may have unfairly influenced the jury on both the liability and damages issues. On April 11, 1995 the District Court entered a Notice of Intent To Grant A New Trial (App. D), a five page document which fully explained the Court's reasoning and concluded:

The court finds that there are grounds for a new trial and will order a new trial on all issues presented at the first trial unless parties elect to decline the opportunity to retry the case. The parties shall advise the court in writing by May 1, 1995 whether or not they wish to proceed with a new trial.

On May 1, 1995, the District Court entered a Clarification of Intent To Grant A New Trial (App. E), which noted Petitioners' desire:

> not . . . to reopen the issue of liability against Defendant Niemann and intend[ing] instead to move for a new trial limited to damages against defendant Niemann and both liability and damages against the City of Fargo. The court will afford [Petitioners] an opportunity to present such a motion.

The District Court entered final judgment on the Jury Verdict on May 10, 1995 (App. F), after which Petitioners filed a timely Motion For A New Trial And To Alter Judgment on May 22, 1995, asking the District Court for the following (alternative) remedies for retrial:

> 1) Grant summary judgment on liability against all [Respondents] and conduct a new trial limited to the issue of damages;
>
> 2) If the Court is still persuaded that a fact issue remains, grant a *new trial on liability and damages as to [Petitioners] Arnold and the City of Fargo*, and limited to damages against [Respondent] Niemann.

On August 14, 1995, the District Court entered a Memorandum and Order (App. G) a four page opinion which addressed the Petitioners' motion and resolved several other post-trial motions as well. The Court:

> a) Declined to alter the judgment by revising its earlier summary judgment rulings;

b) Denied Petitioners' request for a new trial on *damages only* against Niemann;

c) Stated that it had already ordered a new trial on terms different than those requested by Petitioners;[1] and

d) Granted Petitioners' motion for an extension of time to file an Attorneys' Fee application until 20 days after final judgment was entered after "retrial".

4. Second Summary Judgment Decision and Second Trial.

Before retrial, the United States Court of Appeals for the Eighth Circuit decided *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) and *Kirkeby v. Furness*, 92 F.2d 655 (8th Cir. 1996), relevant intervening cases which led the District Court to permit the parties to renew motions for summary judgment. On April 10, 1997, the District Court entered a Memorandum and Order granting summary judgment in Niemann's favor (based on *Veneklase*) but in Petitioners' favor against the City (based on *Kirkeby*). This is what the District Court said about its prior orders as it

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[1] This characterization by the district court is not exactly accurate. A closer look reveals that what the district court always intended (i.e., a new trial on liability and damages) is exactly what the petitioners sought against the City of Fargo as an alternative ground for relief in their post-trial motion. It is more accurate to say that Petitioners' motion for a new trial was granted in part and denied in part.

reviewed the history of this case in that summary judgment order:

Following the Jury's verdict, this court vacated the jury's findings and ordered a new trial, on both liability and damages issues, because the court found that the "Mitigation of Damages" Instruction and defendants' counsel's closing argument were misleading to the Jury.

A second trial (limited to damages against the City) was conducted in August 1997. The jury awarded damages in the amount of $2,150.00, and the district court later awarded attorneys' fees ($67,305.00) and costs ($2,097.94) to Petitioners. (App. H). In its Memorandum and Order awarding attorney's fees, the court stated:

> Following the jury verdict [in the first trial], this court vacated the jury's findings and ordered a new trial because the court found that one of its jury instructions and defense counsel's closing argument relating to that instruction were misleading to the jury.

The City of Fargo appealed and Petitioners cross appealed against the police officers.

5. Jurisdictional Issue Raised For First Time On Appeal in City of Fargo's Opening Brief.

Although the City never once suggested in the district court that the second trial was jurisdictionally defective, it raised this issue for the first time in its appeal brief filed in the Eighth Circuit on July 22, 1998. On August 5, 1998, Petitioners filed a motion for partial remand under Civil Rule 60(a) so that the District Court would have the opportunity to

correct its "oversight or omission" of failing explicitly to order a new trial. The motion for partial remand was essentially ignored by the Eighth Circuit.

On July 22, 1999 an Eighth Circuit panel entered an opinion (App. A) holding that the District Court had never ordered a new trial, that the August 14, 1995 Order was a denial of Petitioners' motion for a new trial, that a separate document under Civil Rule 58 was not required for disposing of such a post-trial motion, and that the District Court's jurisdiction had ended when there was no appeal from the August 14, 1995 Order.

On August 5, 1999, Petitioners filed a Petition For Rehearing with Suggestion For Rehearing En Banc. The Petition was denied per Eighth Circuit Order dated August 24, 1999. (App. B).

6. Comment on Lower Court Decisions

Several comments are necessary to give full context to what happened below, notwithstanding the narrow issue presented in this Petition.

A. The District Court's Orders

The District Court erred only to the extent that its orders regarding a new trial, taken as a whole, carried a degree of ambiguity. The District Court's entries stated its intention to grant a new trial (April 11, 1995) (App. D) and clarified that intention (May 1, 1995) (App. E) prior to entering final judgment (May 10, 1995) (App. F) on the first jury verdict. The problem arose with the Court's Memorandum and Order (August 14, 1995) (App. G) deciding Petitioners' timely

motion for a new trial, which stated (as did several later opinions) the District Court's belief that it had *already* ordered a new trial. What was lacking was an order stating that the Court "is hereby ordering" a new trial, although no one seemed misled by that omission. Indeed, all of the parties litigated the case for two more years until a second trial took place in August 1997.

Moreover, there was no error in the District Court's failure to enter a "separate document" under Civil Rule 58, because clearly the Court did not consider the case to be over. What other conclusion is possible from the District Court's grant of Petitioners' motion to defer an attorney fee application until after "retrial"?

B. The Eighth Circuit's Decision

The Eighth Circuit's decision is far more troublesome and misleading. Within two weeks of first being confronted by the jurisdictional challenge appearing in the City of Fargo's appeal brief in July 1998, Petitioners filed a Motion For Partial Remand under Civil Rule 60(a) so that the District Court could correct' its "oversight or omission"; *i.e.*, its failure to order (in the present tense) the new trial which everyone knew was intended. Petitioners provided the Eighth Circuit with ample precedent for such a remand and there is no doubt what the District Court would have done given that opportunity. The Eighth Circuit considered the motion for nearly four months before deferring a ruling and taking the motion under submission to be heard with the merits of the case at oral argument. However, at oral argument the panel was unaware that such a motion had ever been filed. Even after the motion was physically displayed by counsel at oral argument, the panel published an opinion without ruling on

the motion and, worse yet, suggesting that the remand issue was only raised at oral argument.

There are other mischaracterizations in the Eighth Circuit opinion which need not be detailed here. All of this procedural confusion circles back to the subject of this Petition: the need to observe the separate document requirement of Civil Rule 58 when entering post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1).

The Eighth Circuit below disposed of this issue as follows:

> The plaintiffs further argue that the district court's order of August 14, 1995 does not constitute a final appealable order due to noncompliance with Rule 58 of the Federal Rules of Civil Procedure. Rule 58 requires for entry of a final judgment, the entry of a separate document, and notation in the docket by the district court clerk. The plaintiffs' argument fails because the denial of a motion for a new trial leaving the old judgment unaffected does not fall under Rule 58. See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994). The district court is not required to issue a new judgment or enter a separate written order. Id. On May 10, 1995, the district court signed a document entitled "Judgment" and the Clerk of the United States District Court of the District of North Dakota entered the "Notice of Entry of Judgment" that same day. Thus, the district court followed the requirements of Rule 58.

(App. A at 8).

REASONS FOR GRANTING THE WRIT

The primary reasons for granting the writ go to the core of this Court's certiorari jurisprudence: (1) the issue presented is an important question of federal law, and (2) a significant split of authority exists in the federal circuits. Supreme Court Rule 10(a) & (c). As noted by a leading commentator: "The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions." 16A Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure § 3950.2, p. 122 (1999).

I. Important Question of Federal Law.

A. There is a compelling need for the uniform application of the Rule 58 separate document requirement to all orders which commence the time for appeal.

This Court has not previously addressed the specific question of the application of the Rule 58 separate document requirement to post-judgment orders, "an important question of federal law that has not been, but should be, settled by this Court," Supreme Court Rule 10(c), and which reflects splintered disagreement between the circuits. *Id.*, Rule 10(a). Just as "a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court," *Acosta v. Louisiana Dept. of H. & H. Res.*, 478 U.S. 251, 253 (1986), so does a direct conflict over the Rules of Civil Procedure. "[S]urely such a commonplace affair as the time for appeal should not be permitted to breed litigation." *United States v. Schaefer Brewing Co.*, 356 U.S. 227, 251 (1958) (Harlan, J., dissenting).

> A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.

United States v. Indrelunas, 411 U.S. 216, 218 (1973).

> These issues are of some importance to both appellants and the federal courts as the described omissions [failure to create separate document and enter it in the docket] may result in unnecessary confusion, inefficient marshalling of judicial resources, and, most important, delays in obtaining or, possibly, actual loss of the right to, appellate review. While it cannot be said that these omissions occur on a daily basis, their regularity, the mischief they may cause, and the inconsistent treatment they have received by the courts and commentators, suggest that a clear and cogent resolution is needed.

Michael Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 60 N.Y. Law. School. L.R. 409, 409 (1996).

Two Circuit Courts of Appeal have appointed highly qualified amici curiae to argue this critical jurisdictional question that governs the timeliness of appeals. The First Circuit appointed Hill and Barlow Senior Counsel Gael Mahony and Harvard Law Professor David Shapiro to advise it on the matter in *Fiore v. Washington County Corn. Mental*

Health Ctr., 960 F. 2d 229 (lst Cir. 1992) (en banc).[2] The D.C. Circuit appointed Deanne Maynard as amicus curiae to represent an appellant before the court for purposes of briefing and arguing this issue in *U.S. v. Haynes*, 158 F.3d 1327 (D.C.Cir. 1998).[3]

The quality of the amici appointed is indicative of the importance attached to this issue. This Court has recognized "the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken[.]" *United States v. Schaefer Brewing Co.*, 356 U.S. at 230. As the D.C. Circuit has stated: "[T]he [Rule 58] issues raised in this matter are recurring and are important for the sound and orderly administration of justice in this District." *Diamond by Diamond v. McKenzie*, 770 F.2d 225, 226 (D.C.Cir. 1985). A leading commentator agrees that the rules on entry of post-judgment orders, being jurisdictional, "should be bright

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[2] From 1984 to 1991 Mr. Mahony served on the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He was appointed by Chief Justice Warren Burger. Professor Shapiro teaches civil procedure at Harvard Law School and has been a tenured faculty member there since 1966.

[3] Deanne Maynard has been editor of the Harvard Law Review and served as Law Clerk to United States Supreme Court Justice Stephen G. Breyer in the 1994 term. Assisting her in this assignment were Ian Gershengorn and Ann Kappler. Mr. Gershengorn was a member of the Harvard Law Review and served as Law Clerk to United States Supreme Court Justice John Paul Stevens in the 1994 term. Ann Kapler was editor-in-chief of the New York University Law Review and served as Law Clerk to United States Supreme Court Justice Harry A. Blackmun during the 1987 term. Biographical information is found under Attorney Profiles at <http://www. martindale.com>.

and clear so that there is no uncertainty about when the time begins to run." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 128 (1999).

B. Mechanical application of the Rule 58 separate document requirement to all orders intended to commence the appeal periods defined in Appellate Rule 4(a) is required by the text of the Civil and Appellate Rules and is supported by this Court's prior holdings.

Rule 58, Fed. R. Civ. P., states in part: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 54(a) states in part: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

This interplay between Civil Rules 54(a) and 58 should alone suffice to establish the requirement of a separate document even for the denial of a post-trial tolling motion. It appears, however, from some of the circuit case law discussed below that semantical differences have unnecessarily confused the issue.

Simply stated, the problem is this. Some courts construe an order denying a post judgment motion for a new trial to be a new final (appealable) judgment which must conform to the Rule 58 requirement. Other courts construe it to be a non-appealabale order which has the *effect* of restarting the appeal clock on the original appealable final judgment, and which therefore does not require a Rule 58 separate

document. Still other courts have unclear or inconsistent positions.

Fortunately, this Court can end the debate without wading into that semantical difficulty merely by clarifying and imposing a uniform application of Rule 4, Fed.R.App.P., which already answers the question.

> Rule 4(a) of the Federal Rules of Appellate Procedure establishes . . . that a judgment is considered entered for purposes of the Rule only if it has been entered in compliance with Rule 58 of the Federal Rules of Civil Procedure.

Shalala v. Schaefer, 509 U.S. 292, 302 (1993). Rule 4(a)(7) of the Appellate Rules, upon which the Court relied in making this statement, *id.*, applies also to post-trial orders.

When a motion for new trial is timely filed, the time to file an appeal from the judgment runs from "entry of the order" disposing of the motion. Rule 4(a)(4), Fed.R.App.P.

> **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 4(a)(7), Fed.R.App.P. According to the plain language of Appellate Rule 4(a)(7), Rule 58 must be observed in the entry of an order denying a new trial motion to commence the time to appeal the judgment itself. "Rule 4(a) therefore expressly imposes Rule 58's separate document requirement on denials of motions made under Rules 50(b), 52(b), and

59(b) and (e)." *Fiore v. Washington County Com. Mental Health Ctr.*, 960 F.2d at 233.[4]

Although a formal separate document is not required for an order or judgment to be appealable, *Shalala* at 303, citing waiver rule of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) *(per curiam)*, observance of Rule 58 is necessary for the jurisdictional time limits of Appellate Rule 4 to begin running. In the absence of a Rule 58 conforming judgment or post-trial order, a potential appellant does not waive his opportunity to appeal, nor is the case final. "[A] party need not file a notice of appeal until a separate judgment has been filed and entered." *Mallis* at 385. Rule 58 must be "mechanically applied," and may not be modified through "case-by-case tailoring[.]" *Indrelunas* at 221-222. "[Rule 58] should be interpreted to prevent the loss of the right of appeal, not to facilitate loss." *Mallis* at 386, quoting 9 J. Moore, Federal Practice §110.08[2], p.120 n.7 (1970).

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[4] Prior to the adoption of the language of current Appellate Rule 4(a)(7), the previous Appellate Rule 4(a)(6) defined entry of a judgment or order as entry "in the civil docket." The sentence was amended in 1979 "to call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document." Advisory Comm. Notes to 1979 Amendment, Rule 4(a)(6). *See* Zachary, *Rule 58 and 79(a)*, 60 N.Y.Law.School.L.R. at 414 n.19 for further citations and analysis. Since 1979, the express language of Appellate Rule 4 makes Civil Rule 58 as applicable to post-judgment orders which restart the appeal clock as to judgments themselves. "The time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion[.]" Appellate Rule 4(a)(4)(A). "Entry" by definition requires compliance with Rule 58. Appellate Rule 4(a)(7). Civil Rule 58 requires that the judgment or order in question must be set out in a "separate document . . distinct from any opinion or memorandum" that supports it. Advisory Comm. Notes to 1963 Amendment, Rule 58.

II. Conflict in the Circuits

The holding of the Eighth Circuit in the opinion below, relying on Fifth Circuit precedent, is in flat contradiction to leading cases in the First Circuit and D.C. Circuit. This conflict is not an isolated one, but reflects a general confusion throughout the federal circuits.

A. Circuits which apply the separate document requirement of Rule 58 to denial of post-judgment tolling motions.

The following circuits apply the separate document rule correctly to all post-judgment orders that begin anew the time for appeal.

1. First Circuit

"By far the most comprehensive examination of the requirement of a separate document for postjudgment motions, dealing both with denials and grants of those motions, is by the First Circuit sitting en banc in Fiore v. Washington County Community Health Center [960 F.2d 229 (1992)]." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, pp. 127. Although *Fiore* reviewed the practice of making a marginal notation on a photocopy to dispose of a post-trial motion, the court made it clear that a combined opinion and order also failed to satisfy Rule 58. *Fiore* at 235, n.9.

The court held that:

> Any order denying (as well as granting) post-judgment motions under Rules 50(b), 52(b),

> 59(b) and (e), and 60(b) of the Federal Rules of Civil Procedure must be set forth on a "separate document."

Id. at 239.

In its analysis the court noted the clear language of Rule 4(a)(7), Fed.R.App. P., and stated: "Rule 4(a) therefore expressly imposes Rule 58's separate document requirement on denials of [Rule 4(a)(4)] motions." *Fiore* at 233. Reaffirming that the purpose of Rule 58 is to make clear when the time for appeal starts, the court stated: "Logically, then, the rule should be applied to the specific order that starts the clock running. Without consistent application of this formality, there would be no unambiguous signal that the time for appeal has begun to run." Such language collides with the Eighth Circuit position in this case that the Rule 58 requirement changes depending on whether or not the original judgment is changed by the post-trial order. As the First Circuit stated:

> [T]he separate document setting forth the original judgment is of no help in determining the precise date on which the time to appeal begins to run. The significant date is the date of the order denying the motion. Because Rule 58's purpose is to ensure that that date is precisely clear, the separate document requirement must apply to such orders.

Id. at 234.

The First Circuit's position is in accord with the text of the civil and appellate rules as well as *Indrelunas'* repudiation of "case-by-case tailoring" of Rule 58.

> [C]onsistency and clarity are better achieved by following the rules as they are written than by trying to draft a set of exceptions or by making efforts to distinguish one type of judgment or order from another. Accordingly, we accept amici's recommendation that we adopt a uniform approach applying Rule 58 to all final orders denying *and, a fortiori,* granting post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b).

Fiore at 234.[5]

2. D.C. Circuit

In *Diamond by Diamond v. McKenzie,* 770 F.2d 225 (D.C.Cir. 1985), the court noted that "a combined decision and order" does not satisfy Rule 58. *Id.* at 230, n.10. Chief Judge Robinson, concurring, stated: "Rule 58's separate-document requirement bears vitally on the timeliness of post-judgment motions and appeals." *Id.* at 231.

In *U.S. v. Haynes,* 158 F.3d 1327 (D.C.Cir. 1998), the court applied this reasoning and the related "separate document" analysis to orders on Rule 60(b) post-judgment motions. *Id.* at 1328. The appellee argued that the original final judgment was the only separate document needed and that any other approach would create "a boon for tardy

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[5] Having adopted a blanket rule, the First Circuit then carved out an exception, inferring finality if a motion for entry of judgment is not made within three months of the order in question. *Fiore* at 236. No court or commentator who has addressed the question agrees with *Fiore*'s three-month limit on appealability and this case presents a perfect example of why it is unworkable.

appellants." *Id.* at 1329. The court made short work of these arguments.

> These objections do not come within a country mile of the sort of incoherence or inconsistency in the literal language of the rules that . . . would allow a court to go beyond the rules' plain meaning.

Id. (citation omitted). The separate document requirement, the court stated, "is as clarifying in the one context as in the other." *Id.* The court "left for another day" the issue of the relationship of Rule 4(a)(4) tolling motions to Rule 58, but did "note in this connection that Fed.R.App.P. 4(a)(7) provides that judgments or orders are deemed entered under Rule 4 only when entered in compliance with Fed.R.Civ.P. 58." *Id.* at 1330. The court allied itself with the First Circuit's decision in *Fiore* but held that the *Fiore* three-month limit on appealability did not apply. *Id.* at 1330-1331.

Finally, the court rejected the contention that the district court's three-page "Memorandum Opinion and Order" qualified as a separate document under Rule 58. "In light of *Diamond by Diamond*, we think it understandable that the government found itself speechless when invited at oral argument to explain how, if Rule 58 applied, the Memorandum Opinion & Order could be thought to qualify." *Id.* at 1331.

3. Tenth Circuit

The Tenth Circuit has adopted in an unpublished opinion the First Circuit's position in *Fiore* that the separate document requirement is applicable to all judgments or orders that start the appeal clock. In *Woods v. Wal-Mart*, 124

F.3d 219 (10th Cir. 1997) (table), the court stated that "orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments[.]" The Tenth Circuit stated further:

> There is some controversy whether Rule 58 even applies to orders denying post-judgment relief. *Compare Fiore v. Washington County Community Health Ctr.*, 960 F.2d 229, 232-34 (1st Cir. 1992) (citing text and policy to apply rule), with *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993) (relying on analysis of post-judgment context to hold rule inapposite). But we have applied it to the denial of a new trial motion, *see Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), and, "[b]ecause the underlying principles are closely analogous," there is good reason "to adopt a uniform approach for all orders denying post-judgment motions." *Fiore*, 960 F.2d at 232.

Woods v. Wal-Mart, *supra*, n.3.

B. Circuits which do not apply the separate document requirement of Rule 58 to denial of post-judgment tolling motions.

In addition to the Eighth Circuit, the following courts of appeal do not require entry of a separate document upon denial of a post-trial tolling motion.

1. Fifth Circuit

In *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994), the district court disposed of a post-trial tolling motion

by "a written minute entry that was entered in the docket, but did not issue a written order denying the motion." *Id.* While acknowledging that "Rule 58 clearly requires the entry of a separate, written order," *id.*, the *Marre* court followed three other circuits in holding that denials of post-trial motions (as opposed to grants of such motions), do not require a separate, written order. "The Seventh, Ninth and Eleventh Circuits . . . do not require a separate, written order for the denial of a post-trial motion." *Id.*

2. Seventh Circuit

In *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), the court stated: "A minute order suffices when the judge denies a request to alter the judgment, for then the original judgment remains in effect." *Id.* at 347. When the judgment changes as a result of a post-trial motion, however, the appeal time is suspended "until the effective judgment is set forth on a separate sheet of paper." *Id.* The Seventh Circuit has approved this reasoning in subsequent cases. *See Wikoff v. Vanderveld*, 897 F.2d 232, 236 (7th Cir. 1990). In *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993), the Seventh Circuit noted its conflict with the First Circuit.

> There is no requirement in this circuit that the order denying the motion comply with Rule 58. [citations omitted]. The qualification "in this circuit" is important, because the First Circuit, in a recent en banc opinion, concluded after careful examination of the issue that Rule 58 applies to all appealable orders, including post-judgment orders. *Fiore v. Washington County Community Mental health Center*, 960 F.2d 229 (1st Cir. 1992) (en banc).

3. Eleventh Circuit

The issue in *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), was whether an amended judgment had to comply with Rule 58 and be entered on a separate document from the original judgment. The court decided to take "a practical, common sense approach" to this question, thus freeing itself from the mechanical strictures of Rule 58. *Id.* at 1560. The court ruled that even when a post-trial motion was granted and the judgment altered, the new judgment did not have to be set out on a separate document of its own. The "best choice," the court said, is to require "no second document when a district court amends a judgment." *Id.* at 1560-61. Though the court acknowledged that requiring a new separate document for all changes in a judgment might enhance certainty "that the time for appeal has begun to run anew," it balked at taking this step.

> The logical extension of that reasoning, however, is that Rule 58 requires a new separate document even when the district court *denies* a post-judgment motion, since such a requirement would provide a signal that the time for appeal has begun to run again. This interpretation goes far beyond the scope and purpose of Rule 58 and we decline to adopt it.

Id. at 1560.

C. Circuits which have not taken a position on application of the Rule 58 separate document requirement to denial of post-judgment tolling motions or which have inconsistent precedent on the question.

1. Second Circuit

In RR *Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2nd Cir. 1987), the district court, in response to a post-judgment motion, vacated its original judgment for defendants and entered a second Memorandum-Decision favoring the plaintiffs. Three weeks later the court entered judgment on its second Memorandum-Decision. The appeal question was whether the appeal time ran from the second Memorandum-Decision or from the subsequent judgment. *Id.* at 1200. In discussing the application of Rule 58 to the grant of a post-judgment motion, the court stated its result in terms that applied to all post-judgment tolling motions.

> Thus, under Fed.R.App.P. 4(a)(6), an order disposing of a motion under Fed.R. Civ. P. 59 is not effective until set forth on a separate document.
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> Although a one-sentence order denying a motion satisfies the separate-document requirement, an order that is part of a district court opinion or memorandum does not.

Id. at 1201. However, the Second Circuit's position is less clear after *Cooper v. Town of East Hampton*, 83 F.3d 31, 35 n.3 (2d Cir. 1996) ("We express no view as to the application

of the separate document requirement of Rule 58 to post-judgment rulings.")

2. Third Circuit

The Third Circuit has not addressed the question of Rule 58 in the post-judgment context either directly or by implication through decision in a particular case. However, it did hold in the context of an original judgment that a four-page document entitled "Memorandum Opinion and Judgment," failed to satisfy Rule 58's separate document requirement. *Gregson v. Government of the Virgin Islands*, 675 F.2d 589 (3rd Cir. 1982). Because the 30-day appeal time never began to run, "the notice of appeal cannot be untimely." *Id.* at 593.

3. Fourth Circuit

The Fourth Circuit appears to agree with the Petitioners' position in practice without actually saying so. The Fourth Circuit may indeed be better characterized with the First and D.C. Circuits. In *Hughes v. Halifax County School Board*, 823 F.2d 832 (4th Cir. 1987), the district court had entered an order combining a four-page discussion of a post-trial motion with a judgment disposing of all claims in the case. Without articulating a distinction between the application of Rule 58 in the judgment and post-judgment contexts, the Fourth Circuit found that the district court's post-trial order violated the "strict standard" of Rule 58. *Id.* at 835.

> In applying the Rule 58 requirement to a given situation, the form and content of the document at issue are determinative. Brevity is an important factor:

> an order unaccompanied by a long explanation is likely to be considered a "judgment."
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> By contrast, a document which attempts to combine the court's reasoning and its final disposition is not likely to be considered a "separate document" under Rule 58.
>
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>
> The mere fact that the district court used the term "judgment" repeatedly on the last page of the order is not dispositive.

Id. See also Barber v. Whirlpool Corp., 34 F.3d 1268 (4th Cir. 1994) (11-page document, last page of which was an order dismissing post-trial motions, did not comply with Rule 58 and thus did not trigger appeal time).

4. Sixth Circuit

In *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983), the court recognized that according to then appellate rule 4(a)(6), Rule 58's separate document requirement applied to orders on post-judgment tolling motions. The appeal time ran from the judgment entered on the post-trial motion and not from an earlier-filed opinion. In *Cloyd v. Richardson*, 510 F. 2d 485 (6th Cir. 1975), the court stated that a combined "Judgment and Order" containing the court's findings and reasonings did not comply with Rule 58. However, it is also the position of the Sixth Circuit that the separate document rule is a "mere technicality" when "appellant was not misled by the failure to enter a separate judgment." *Amoco Oil Co., v. Jim Heilig Oil & Gas, Inc.*, 786 F. 2d 1163 (6th Cir. 1986), *cert. denied*, 479 U.S. 966. This "case-by-case tailoring" of Rule 58 contradicts *Indrelunas* and is contrary to the *Mallis*

teaching that Rule 58 is always applied to save appeals, not to forfeit them. *See Amoco Oil, supra,* (Blackmun, J., dissenting from denial of certiorari).

5. Ninth Circuit

"Wherever the rules establish a time requirement that limits a litigant's ability to obtain relief from a final judgment, it is imperative that the court provide a clear signal that the time period within which that relief can be sought has begun to run." *Carter v. Beverly Hills Say. & Loan Ass'n,* 884 F.2d 1186, 1189 (9th Cir. 1989). Ironically, Ninth Circuit case law has failed to do this.

In *Hard v. Burlington Northern Railroad* Co., 870 F.2d 1454 (9th Cir. 1989), the court examined the timeliness of an appeal from a "Memorandum and Order" denying a motion for a new trial. Even though the notice of appeal was filed 33 days after the "Memorandum and Order" was entered, the Ninth Circuit held that the appeal was timely.

> In the present case the order of the district court denying the appellant's motion for a new trial was contained in the last sentence of a nine page memorandum. We agree with the Fourth Circuit that "an order . . . tacked onto the end of an opinion, no matter how explicit, simply does not qualify as a separate document for the purpose of evaluating the timeliness of an appeal." *Caperton v. Beatrice Pocohantas Coal* Co., 585 F.2d 683, 689 (4th Cir. 1978). Consequently, the trial court's order was not entered within the meaning of Rule 4(a)(4), and Hard's appeal was timely filed.

Id. at 1458.

A mere six months later, however, a different panel, without mentioning *Hard*, abandoned the separate document requirement for orders denying post-judgment motions. In *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989), the notice of appeal was filed more than a year after the denial of the motion for new trial. The district court had filed a document entitled "Order Denying Plaintiffs New Trial Motion," a nine-page explanatory opinion with a one-sentence order denying the motion tacked onto the end of the opinion and not entered as a separate document. *Id.* at 1230. The court agreed that "the separate entry requirement of Rule 58 applies to orders denying Rule 59 motions," *id.* at 1231, but then disagreed that application of Rule 58 to post-judgment orders required the opinion and the order to be in separate documents. Despite the clear language of the Advisory Committee Note to the 1963 amendments to Rule 58, which the panel quoted, it found that a combination opinion and order was not insufficient in the post-judgment context "simply because the order contains explanatory material." *Id.*

The court distinguished Rule 58 in the final judgment vs. post-judgment context as follows:

> In the context of final judgments, the requirement that the dispositive document be distinct from any opinion serves to eliminate confusion as to which order ends the litigation.
>
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>
> No comparable risk of confusion exists with respect to an order denying a motion for new trial where the order is properly entered on the docket sheet.

Id. at 1232. Thus, the court abandoned mechanical application of Rule 58 in the post-judgment context.

A leading commentator cites the inconsistency between *Hard* and *Hollywood* as one illustration of "disarray" in the case law "on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 122 (1999).

III. Guiding Principles

This case is a poster child for the "disarray" and "confusion" in the lower courts on the application of the separate document requirement of Rule 58 to post-judgment orders, and provides the perfect vehicle for eliminating all existing ambiguities about the procedural requirements for entry of post-judgment orders which begin anew the time for appeal.

> The relative simplicity of [a procedural rule] is one of its virtues. It is of first importance to have a definition that will not invite extensive threshold litigation over jurisdiction, although the resulting differentiations of treatment appear somewhat arbitrary. Jurisdiction should be as self-regulated as breathing[.]

Navarro Savings Ass'n v. Lee, 446 U.S. 458, 464 n.13 (1980) (citations and quotation marks omitted).

> The late Professor Zechariah Chafee, Jr., of the Harvard Law School, thought that questions of jurisdiction should be consistent with "the Bright Line Policy." "The boundary between judicial power and

> nullity should * * * be a bright line, so that very little thought is required to enable judges to keep inside it." The rules on the time for appeal are jurisdictional. They should be bright and clear so that there is no uncertainty about when the time begins to run. The rules announced in Fiore, requiring a separate document in every case where an appeal may be taken, have that virtue, and they also have the virtue that they are not burdensome. It is not hard to prepare a separate document, and once it is known that this is always required, it can be done quite mechanically.

16A Wright Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 128 (1999). *See also Moore's Federal Practice*, § 58.05[2] at 58-63 & n.23 (1991) (When a post-judgment motion is denied, "the better practice would be to follow the separate document requirement . . . .").

When a court issues a combined memorandum and order to resolve a post-trial motion, it is and should be a signal to the litigants that the case is not over. Likewise, when the court issues a post-trial order in a separate document apart from its reasoning or analysis, the litigants are properly on notice that the time for appeal has commenced. This "bright line" rule, required by the language of Appellate Rule 4, supported by the cogent analysis of *Fiore and Haynes*, and recommended by Wright, Miller and Cooper, should be unambiguously imposed by this Court as a strict requirement for all post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1). As this Court stated in 1973: "[T]he separate document provision of Rule 58 is . . . a mechanical change that must be mechanically applied". *United States v. Indrelunas*, 411 U.S. at 221-22 (citation and quotation marks omitted).

IV. Conclusion

Because (1) the issue of the application of Civil Rule 58 to post-judgment orders is one that affects almost all litigants in federal court and (2) the circuits are in "disarray" and "confusion" on this question, the petition for writ of certiorari should be granted in the interest of providing uniform procedural direction for measuring the timeliness of appeals in the federal court system.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 22, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-2144/2416

Gilbert Copper, Adele Norberg,

Cross-Appellants/Appellees,

v.

City of Fargo,

Appellant/Cross-Appellee,

Sherri Arnold, Kevin Niemann,

Defendants.

Appeals from the United States District Court
for the District of North Dakota.

Submitted: May 13, 1999
Filed: July 22, 1999

Before McMILLIAN, BRIGHT, and FAGG, Circuit Judges.

PER CURIAM.

In 1991, police arrested Gilbert Copper and Adele Norberg for unlawful picketing of an individual's dwelling in the City of Fargo, North Dakota, in violation of a 1985 city ordinance. That ordinance provides that "[n]o person shall engage in picketing of the dwelling of any individual in the City of Fargo." Litigation over the arrest and overnight incarceration of Copper and Norberg began in the federal courts in August of 1993 and has continued until disposition of this appeal. The district court[1] conducted two trials. In the first trial, which concluded with a judgment entered on May 10, 1996, Copper and Norberg recovered a judgment of one dollar ($1.00) each against Fargo Police Officer Kevin Niemann but suffered a dismissal of their claims against the City of Fargo. In the second trial, the plaintiffs recovered compensatory damages against the City of Fargo of $2,150.00 in a judgment entered September 8, 1997. The court awarded attorneys' fees of more than $67,000.00 in favor of the plaintiffs.

Much of the work of the trial court and counsel for both parties is for naught. The trial court and the parties participated in a new trial on liability and damages. However, the trial court never in fact ordered a new trial. Thus, only the judgment in the first trial will be enforced and all proceedings after September 12, 1995, including the second jury trial, are vacated as outside the jurisdiction of the district court.

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[1] A United States Magistrate Judge for the District of North Dakota presided with the consent of the parties. See 28 U.S.C. § 636(c).

I. BACKGROUND

On August 20, 1991, the plaintiffs, Gilbert Copper and Adele Norberg, and others paraded and picketed in South Fargo in the vicinity of the dwelling of a person alleged to be a spokesperson for an organization that provides abortion services in the City of Fargo. After receiving a report that a physical altercation between neighborhood residents and the picketers had occurred, Fargo Police Officers Kevin Niemann and Sherri Arnold arrived on the scene. After warning the picketers that they would be arrested for violating the City of Fargo's home picketing ordinance if they did not leave the neighborhood, the police arrested some of the picketers for violating the ordinance. Copper and Norberg were held overnight in jail and the City of Fargo filed charges against them in Cass County District Court for violating the City of Fargo's home picketing ordinance. On February 18, 1992, the Honorable Frank L. Racek dismissed the charges, concluding that the ordinance was constitutional on its face, but unconstitutional as applied to Copper, Norberg and the other picketers arrested on August 20, 1991.

On August 18, 1993, Copper and Norberg (hereinafter "plaintiffs") brought an action against the City of Fargo and Fargo Police Officers Arnold and Niemann. Plaintiffs sought damages for alleged violations of their constitutional rights of speech and assembly based on unconstitutional enforcement of the City of Fargo's home picketing ordinance. On December 30, 1994, the district court dismissed the plaintiffs' federal constitutional claims against Officer Arnold and the plaintiffs' state law claims against all defendants. The district court determined that a fact issue existed as to whether Officer Niemann was aware, at the time of the arrest, of the scope and distance of the plaintiffs' route. After a jury trial on

January 10-13, 1995, the jury found the plaintiffs failed in their burden of proof against the City. The jury also found that Officer Niemann failed to establish his qualified immunity defense and awarded Copper and Norberg damages in the amount of $1.00 each against Officer Niemann.

On April 11, 1995, the district court issued a notice of intent to grant a new trial stating that the court found that its mitigation instruction may have misled the jury and combined with the "defendants' closing argument [was] clearly injurious to plaintiffs' case and so prejudicial as to warrant retrial of both the liability and damages issues presented at the first trial." Jt. App. at 144. The court concluded it would wait to enter judgment until the parties advised the court whether they wanted to proceed with a new trial. On May 1, 1995, the district court issued a clarification of its notice of intent to grant a new trial indicating that the district court would give the parties an opportunity to submit motions as to whether a new trial limited to damages against defendant Niemann, and both liability and damages against the City of Fargo should be granted. In that notice, the court also indicated that it would enter judgment on the jury's verdict from the first trial on May 10, 1995.

On May 10, 1995, the district court entered a final judgment pursuant to the jury verdict.[2] On May 22, 1995, within the

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[2] The judgment pronounced that:

> 1. Plaintiffs' complaint and causes of action against defendant Sherri Arnold are dismissed with prejudice.
>
> 2. Plaintiffs' complaint and causes of action against defendant City of Fargo are dismissed with prejudice.

statutory time limit of ten days, the plaintiffs moved, pursuant to Rules 59(a) and 59(c), for a new trial limited to the issue of the plaintiffs' damages and further moved the court to alter the judgment accordingly. In the conclusion to a memorandum attached to their motion, the plaintiffs asked the court to grant a new trial and/or amend the judgment as follows: "1) Grant summary judgment on liability against all defendants and conduct a new trial limited to the issue of damages; 2) If the Court is still persuaded that a fact issue remains, grant a new trial on liability and damages as to Defendants Arnold and the City of Fargo, and limited to damages against Defendant Niemann." Jt. App. at 152. On August 14, 1995, the district court denied this motion for new trial stating as follows: "Plaintiffs' motion for a new trial on damage issues only (doc. #77) is denied." Jt. App. at 157.[3] No further action occurred in the case until September 27,

---

> 3. The third and fourth causes of action set forth in plaintiffs' complaint against defendant Kevin Niemann are dismissed with prejudice [state law claims for malicious prosecution and false arrest/false imprisonment].
>
> 4. Judgment is entered in favor of plaintiff Gilbert Copper and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.
>
> 5. Judgment is entered in favor of plaintiff Adele Norberg and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

Jt. App. at 147-148.

[3] Doc. #77 is the plaintiffs' motion for new trial.

1995, when the clerk's minutes reflect a status conference and discussion of possible new trial dates.

On April 10, 1997, the district court determined that the City of Fargo's 1985 home picketing ordinance was unconstitutional as a content-based restriction on free speech under this court's decision in Kirkeby v. Furness, 92 F.3d 655 (8th Cir. 1996). The district court therefore granted summary judgment on liability against the City and granted summary judgment dismissing defendant Niemann from the action. Thereafter, on August 21, 1997, a second jury trial occurred in which the jury awarded damages in the amount of $1,000.00 in favor of Copper and $1,150.00 in favor of Norberg solely against the City of Fargo. From a judgment entered on September 18, 1997 and the award of attorneys' fees on March 31, 1998, the City brings this appeal.[4]

II. DISCUSSION

The district court did not have jurisdiction to conduct a second trial in this case because it never entered an order granting a new trial. Rule 59 of the Federal Rules of Civil Procedure requires a party to move for a new trial within ten days after judgment. Rule 59 further provides:

> **(d) On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of

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[4] The plaintiffs have also filed a cross-appeal seeking a new trial against Officer Niemann, as well as Officer Arnold, and seeking punitive damages against them. In light of our disposition of this case determining that the first trial resulted in the final judgment, we will not address those issues and they are now moot.

> judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

The district court denied the plaintiffs' motion for a new trial on August 14, 1995, and never issued an order granting a new trial on all issues. Notwithstanding that no order granting a new trial on all issues exists, the plaintiffs contend that language in the August 14, 1995 order combined with language in the district court's previous orders demonstrate that the court implicitly granted a new trial on the court's own initiative. This argument fails because a district court cannot implicitly grant a new trial under Rule 59. Instead, if a district court denies a party's motion for a new trial, the district court must specify other grounds for a new trial in an order under Rule 59 if it decides on its own initiative to grant a new trial. See Central Microfilm Serv. v. Basic/Four Corp., 688 F.2d 1206 (8th Cir. 1982). This court stated as follows:

> When a party has timely moved for a new trial but the court orders such relief on a ground not raised in the motion, the court is deemed to have acted on its own initiative. Under Rule 59, however, the court has authority to act outside the ten-day limit in this circumstance, provided it gives the parties notice and an opportunity to

> be heard and specifies the grounds on which it grants the new trial.

Id. at 1211 (citing Wright & Miller, Fed. Prac.& Proc. § 2813). In this case, the district court never did issue an order granting a new trial and, therefore, did not specify grounds for a new trial as would be required by Rule 59.

That the parties and the district court continued with proceedings subsequent to the final judgment in this case does not constitute a waiver of the requirements of the Federal Rules of Civil Procedure. The district court lost jurisdiction to further litigate this case. The district court and the parties cannot waive the requirements of Rule 59. See Nugent v. Yellow Cab. Co., 295 F.2d 794 (7th Cir. 1961).

The plaintiffs further argue that the district court's order of August 14, 1995 does not constitute a final appealable order due to noncompliance with Rule 58 of the Federal Rules of Civil Procedure. Rule 58 requires for entry of a final judgment, the entry of a separate document, and notation in the docket by the district court clerk. The plaintiffs' argument fails because the denial of a motion for a new trial leaving the old judgment unaffected does not fall under Rule 58. See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994). The district court is not required to issue a new judgment or enter a separate written order. Id. On May 10, 1995, the district court signed a document entitled "Judgment" and the Clerk of the United States District Court of the District of North Dakota entered the "Notice of Entry of Judgment" that same day. Thus, the district court followed the requirements of Rule 58.

Alternatively, the plaintiffs contend there exists no final appealable order because the issues raised in the new trial motion were still pending. See Washington v. Confederated Tribes, 447 U.S. 134, 149-50 (1980). A non-final order would deprive this court of jurisdiction under 28 U.S.C. § 1291. Specifically, the plaintiffs assert that the district court failed to address their second request in their memorandum for "a new trial on liability and damages as to Defendants Arnold and the City of Fargo, and limited to damages against Defendant Niemann." Jt. App. at 152. However, on its face the August 14, 1995 order did not leave any issues unresolved. As previously stated, the order denied the plaintiffs' motion for a new trial on the issue of damages only. The order also stated that the district court would not "alter the judgment entered in this case according to plaintiffs' suggestions." Jt. App. at 156.

During oral argument, the plaintiffs also referred to Rule 60(a) of the Federal Rules of Civil Procedure which reads as follows:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R.Civ. P. 60(a). We reject the plaintiffs' contention that the jurisdictional problem in this case can be remedied by classifying it as a clerical mistake. This is not a clerical mistake in a judgment or order. The district court simply did not issue an order for a new trial.

Accordingly, we find no merit and no case law which supports the plaintiffs' suggestions that the second trial comes within the jurisdiction of the district court. Therefore, we enforce the judgment rendered at the conclusion of the first trial. Moreover, because of the change in judgment, we remand this case to the district court to modify the attorneys' fees awarded. The plaintiffs, as the prevailing party in the first jury trial, are entitled to attorneys' fees. However, on remand the district court must determine the appropriate amount of attorneys' fees in light of the damages awarded by the first jury verdict. See Farrar v. Hobby, 506 U.S. 103 (1992). Each party is responsible for their own fees and costs on appeal.

III. CONCLUSION

We conclude that the district court lacked jurisdiction to proceed with a second trial because the record indicates no order granting a new trial as required by Rule 59. We, therefore, reverse the entry of the second judgment and the initial judgment of May 10, 1995 stands. We remand for a determination and award of appropriate attorneys' fees.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT FILED AUGUST 24, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-2144/2416

Gilbert Copper, Adele Norberg,

Cross-Appellants/Appellees,

v.

City of Fargo,

Appellant/Cross-Appellee,

Sherri Arnold, Kevin Niemann,

Defendants.

Order Denying Petition for Rehearing
and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 24, 1999

Order entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

42 U.S.C. §1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

Federal Rules

Federal Rules of Civil Procedure

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

. . .

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

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1963 Amendment

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Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v F. & M. Schaefer Brewing Co.* 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See *id.*; and compare *Blanchard v Commonwealth Oil Co.*, 294 F2d 834 (5th Cir. 1961); *United States v Higginson*, 238 F2d 439 (1st Cir. 1956); *Danzig v Virgin Isle Hotel, Inc.*, 278 F2d 580 (3d Cir. 1960); *Sears v Austin*, 282 F2d 340 (9th Cir. 1960), with *Matteson v United States*, *supra*; *Erstling v Southern Bell Tel. & Tel. Co.*, 255 F2d 93 (5th Cir. 1958); *Barta v Oglala Sioux Tribe*, 259 F2d 553 (8th Cir. 1958), cert denied 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v Federal Home L. Bank Bd.*, 266 F2d 246 (7th Cir. 1959), cert denied 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v Paramount Film D. Corp.*, 278 F2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U. S. District Courts for the Eastern and Southern Districts of New York; *Ram v Paramount Film D. Corp.*, *supra*, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b) and (2) covering the subject of judgments by default.

. . . . . .

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right—when Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from

the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal rule of civil procedure 6(a)) after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

. . . . . .

(7) Entry Defined. A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

. . . . . .

ADVISORY COMMITTEE NOTES

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1979 Amendment

. . . . . .

Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. (Federal Rules of Civil Procedure) that the judgment constitute a separate document. See United states v. Indrelunas, 411 U.S. 216 (1973). when a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise al parties and the district judge. While the requirement of Rule 48 [sic] is not jurisdicitonal. (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977))[sic], compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

. . . . . .

Municipal Ordinances

City of Fargo Residential Picketing Ordinance enacted January 28, 1985.

ARTICLE 10-08 PICKETING

10-0801. Definitions.--For purposes of this article, certain words and phrases used herein are defined as follows:

A. "Dwelling" means any structure or building, or dwelling unit within a building, which is used as a place of residence.

B. "Picketing" means the practice of standing, marching or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief.

10-0802. Picketing of dwellings prohibited.--No person shall engage in picketing the dwelling of any individual in the City of Fargo.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED APRIL 11, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

NOTICE OF INTENT TO GRANT A NEW TRIAL

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, this "court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party," providing that it does so within ten days after entry of judgment. Fed. R. Civ. Pro. 59 (d). "Rule 59 of the Federal Rules of Civil Procedure allows a trial court to order a new trial where necessary to insure that all parties receive a just and fair determination of the issues presented." Brown v. Royalty, 535 F.2d 1024, 1027 (8th Cir. 1976). Furthermore, the Eighth Circuit Court of Appeals has determined that a court may grant a new trial when its instructions to the jury, taken as a whole, do not fairly and adequately submit the issues to the jury or set forth the

applicable law and thus prejudicially affect the verdict. See Laubach v. Otis Elevator Co., 37 F.3d 427, 429 (Sth Cir. 1994); Sherrill v. Royal Industries, Inc., 526 F.2d 507 (8th Cir. 1975). The Eighth Circuit has also ruled that courts are free to grant a new trial when statements made during closing argument are plainly unwarranted and clearly injurious. Griffin v. Hilke, 804 F.2d 1052, 1057 (8th Cir. 1986); Vanskike v. Union Pacific R. Co., 725 F.2d 1146, 1149 (8th Cir. 1984) (citing Homan v. United States, 279 F.2d 767 (8th Cir. 1960)).

On January 10-13, 1995, the single remaining fact issue in the above entitled case was tried to an eight-person jury.[1] At the close of evidence, the court instructed the jury about the sole issue in this matter and the law it should apply in reaching a verdict. The court's instructions included the following:

> INSTRUCTION NO. 20
> **Mitigation of Damages**
>
> A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate--to avoid or minimize those damages.

---

[1] The issue the jury was asked to decide was whether defendant Officer Kevin Niemann was aware, at the time of plaintiffs' arrest, that plaintiffs had been walking a picketing route extending down the block beyond the Gifford residence or whether Officer Niemann reasonably believed that plaintiffs had been demonstrating solely in front of the Gifford residence.

> If you find the defendants are liable and the plaintiffs have suffered damages, the plaintiffs may not recover for any item of damage which they could have avoided through reasonable effort. If you find by a preponderance of the evidence that the plaintiffs reasonably failed to take advantage of an opportunity to lessen their damages, you should deny them recovery for those damages which they would have avoided had they taken advantage of the opportunity.
>
> You are the sole judge of whether the plaintiffs acted reasonably in avoiding or minimizing their damages. Injured plaintiffs may not sit idly by when presented with an opportunity to reduce their damages. However, they are not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendants have the burden of proving the damages which the plaintiffs could have mitigated. In deciding whether to reduce the plaintiffs' damages because of their failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendants have satisfied their burden of proving that the plaintiffs' conduct was not reasonable.

Upon review of the proceedings in this matter, the court finds that this instruction may have misled the jury about the scope of the plaintiffs' obligation to avoid or minimize their

damages. See Miller v. Lovett, 879 F.2d 1066, 1070-71 (2nd Cir. 1989).

> A properly phrased mitigation charge should limit the jury's consideration to what the plaintiff did or should have done after being injured. It focuses on the plaintiff's duty "to prevent the aggravation" of injuries already received and "to effect a recovery from such injuries." There can be no duty to mitigate damages until the injury causing those damages actually occurs.
>
> . . .
>
> If a plaintiff's duty to mitigate damages were to include the duty to avoid the underlying injury, few arrestees could recover damages under § 1983 since most could have "avoided" engaging in the conduct that precipitated the arrest.

Id. (emphasis in original) (citations omitted). The court is concerned that the mitigation of damages instruction above may have created the erroneous impression that plaintiffs could have mitigated their damages by leaving the scene of the demonstration when Officer Niemann asked them to do so. This concern is due in part to the language in the instruction and in part to defendants' application of this instruction in their closing argument.

In their closing argument, defendants noted that Officer Niemann asked plaintiffs to leave the area and then warned them that if they did not go home they would be arrested for violating the Fargo antipicketing ordinance. Defendants then contended that plaintiffs would not have been arrested if they

had heeded these warnings. Additionally, defendants argued that by refusing to leave the scene of the demonstration when asked to do so, plaintiffs reasonably failed to take advantage of an opportunity to lessen their damages; and therefore, pursuant to the court's mitigation of damages instruction, the jury should deny plaintiffs recovery for those damages which they would have avoided had they complied with Niemann's request to leave the area.

The United States Supreme Court in Frisby v. Schultz, 487 U.S. 474, 479-81 (1988), ruled that picketers have a First Amendment right to demonstrate on public streets and sidewalks in a residential neighborhood and this court concluded that plaintiffs were lawfully exercising this constitutional right on August 20, 1991, when they participated in a demonstration near the Gifford residence. Consequently, defendant Niemann had no right to request plaintiffs to leave the demonstration area or to arrest plaintiffs when they failed to do so. Informing the jury that it should deny plaintiffs recovery for damages plaintiffs would have avoided if they had complied with Niemann's request to leave the scene of the demonstration clearly implied that Niemann's actions were appropriate and that plaintiffs had a duty to avoid the arrest. It is very likely that this implication unfairly influenced the jury's decision on the question of liability as well as damages. Accordingly, the court finds that the mitigation of damages instruction in combination with defendants' closing argument were clearly injurious to plaintiffs' case and so prejudicial as to warrant retrial of both the liability and damages issues presented at the first trial. The court will schedule the case for retrial unless the parties elect not to proceed with that option.

IT IS ORDERED that:

The court finds that there are grounds for a new trial and will order a new trial on all issues presented at the first trial unless the parties elect to decline the opportunity to retry the case. The parties shall advise the court in writing by May 1, 1995 whether or not they wish to proceed with a new trial. Entry of judgment will be deferred until that date.

Dated: April 11, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED MAY 1, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

CLARIFICATION OF NOTICE OF INTENT TO GRANT NEW TRIAL

Plaintiffs have responded to the court's April 11, 1995 notice of intent to grant new trial by raising a question about the intended scope of the new trial. Specifically, plaintiffs inquire whether the court intends to retry the issue of liability against the City of Fargo.

In its notice of intent, the court indicated it intended to grant a new trial as to all issues presented in the first trial. The new trial would encompass both the fact issue as to liability and damage issues involving both Kevin Niemann and the City of Fargo.

Plaintiffs indicate they do not wish to reopen the issue of liability against defendant Niemann and intend instead to move for a new trial limited to damages against defendant Niemann and both liability and damages against the City of Fargo. The court will afford plaintiffs an opportunity to present such a motion, but the court questions the propriety of retrying the identical fact issue against one defendant but not the other.

The court recognizes that because of differing burdens of proof, the issue was presented to the jury in a separate interrogatory as to each defendant, but the issue is nonetheless the same. The court has already expressed its concern that the error regarding the mitigation of damages instruction affected the jury's consideration not only of the damages issues in the case, but the liability issues as well. Under the circumstances, it cannot be said that the error potentially influenced the jury's consideration of the evidence against one defendant but not the other. The court will, however, afford plaintiffs an opportunity to preserve their position in the record and will consider any argument they may have regarding not retrying liability of defendant Niemann.

To expedite the retrial matter, the court directs, that the parties have until May 20, 1995 to respond to the court's notice of intent to grant new trial, as clarified herein, as well as to file any motions for new trial on different terms than indicated by the court in its notice. Judgment will be entered on the jury's verdict on May 10, 1995.

The clerk is directed to serve this notice upon counsel for the parties by facsimile transmission.

IT IS SO ORDERED.

Dated: May 1, 1995.

Karen K. Klein
United States Magistrate Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED MAY 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

JUDGMENT

Pursuant to this court's summary judgment ruling and the verdict rendered by the jury in this case, it is **ADJUDGED AND DECREED**:

1. Plaintiffs' complaint and causes of action against defendant Sherri Arnold are dismissed with prejudice.

2. Plaintiffs' complaint and causes of action against defendant City of Fargo are dismissed with prejudice.

3. The third and fourth causes of action set forth in plaintiffs' complaint against defendant Kevin Niemann are dismissed with prejudice.

4. Judgment is entered in favor of plaintiff Gilbert Copper and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

5. Judgment is entered in favor of plaintiff Adele Norberg and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

Dated: May 10, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED AUGUST 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

ORDER

There are several pending motions filed by plaintiffs relating to post-trial matters.

Motion for New Trial/Alter Judgment

On May 22, 1995, plaintiffs filed a motion for a new trial on the issue of damages only and a motion to alter the judgment entered by this court. Plaintiff argues that liability and damages are distinct issues and that this court should reverse its decision to grant a new trial on both the liability and damages issues presented at the first trial. Instead, plaintiff urges this court to grant a new trial on the issue of damages only.

This court has previously considered plaintiffs' request for a new trial on the issue of damages only and determined that the mitigation of damages instruction may have unfairly influenced the jury's decision on the question of liability as well as damages. The court is not persuaded that its decision was erroneous. Accordingly, plaintiffs' motion for a new trial on the issue of damages only is denied.

Plaintiffs also request this court to review its summary judgment rulings.

Specifically, plaintiffs argue that the court erred in ruling that the defendant police officers are entitled to qualified immunity.[1] In support of their argument, plaintiffs contend

---

[1] Although this court ruled that defendant Officer Sherri Arnold was entitled to qualified immunity, it did NOT rule that defendant Officer Niemann was entitled to qualified immunity. To the contrary, the court found that it could not rule on the question of qualified immunity with respect to defendant Niemann because the court found that the evidence submitted presented a genuine factual dispute requiring a jury to assess the credibility of witnesses and resolve inconsistencies in the evidence. At the trial, the jury found that Officer Niemann failed to meet his burden of proving his affirmative defense. Accordingly, the court entered judgment against Niemann, thereby denying his request for qualified immunity from damages.

In its December 30, 1994 summary judgment ruling, this court discussed plaintiffs' claim that the officers had a duty to investigate further before making arrests. In rejecting the claim, the court stated that

> the court finds that if the jury is persuaded by Niemann's version of the events, then a reasonable officer could have found that there was probable cause to arrest the protestors.

that this court found that "there was not probable cause for the arrest of the plaintiffs." Pls.' Mot. for a New Trial and To Alter Judgment, at 7). Plaintiffs are mistaken. The court did not specifically decide whether there was probable cause to arrest plaintiffs.

This court has reviewed plaintiffs' other arguments and found them unpersuasive.[2] Consequently, this court declines plaintiffs' invitation to conduct another review of all liability

---

> Conversely, if the jury is persuaded that Niemann possessed information about the scope and distance of the picketers' demonstration route before he made the arrest, then, viewing the facts in the light most favorable to the plaintiffs, the court concludes that a reasonable officer could not have believed the arrest was lawful.

Order of December 30, 1994, at 34-35.

The jury found that Niemann failed to prove he did not know the extent of the picketing route. Therefore, there is no finding that Niemann acted as a reasonable police officer in deciding to arrest plaintiffs. In light of the jury's finding, any claimed duty to investigate further and the court's earlier discussion of the issue have lost their relevance.

[2] Specifically, the court declines to reconsider its holding that Officer Sherri Arnold is entitled to qualified immunity because plaintiffs' present argument is based on an erroneous factual premise that Officer Arnold learned about the extent of the picketing route in her squad car as she was driving the female picketers to the jail.

As to the City of Fargo, the court again rejects plaintiffs' argument that the city's admission that the police officers acted "pursuant to" the policies, customs, practices, procedures and training when Niemann arrested plaintiffs, based on the nonexistence of any policy or procedure relating to residential picketers.

issues and to alter the judgment entered in this case according to plaintiffs' suggestions.

Motion to File Reply Brief

The court has considered plaintiffs' reply brief and hereby grants leave to file the brief.

Motion for Extension of Time to Submit Application for Attorneys' Fees

Plaintiffs seek an extension of time to apply for an award of attorneys' fees until 20 days after entry of final judgment on their motion for new trial. Judgment has already been entered on the jury's verdict. The court has ordered a new trial on terms different than those requested by plaintiffs. Plaintiffs are granted an extension until 20 days after entry of any judgment following retrial to file an application for attorneys' fees.

Motion to Strike Juror Affidavit

Plaintiffs move to strike an affidavit of a juror filed by defendants. The affidavit is improper under Federal Rule of Evidence 606(b). Plaintiffs' motion is granted.

IT IS ORDERED:

1. Plaintiffs' motion for a new trial on damages issues only (doc. #77) is denied.

2. Plaintiffs' motion for leave to file a reply brief (doc. #83) is granted.

3. Plaintiffs' motion to extend time for application of attorney fees (doc. #78) is granted.

4. Plaintiffs' motion to strike juror affidavit (doc. # 79) is granted.

Dated: August 14, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX H — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA ENTERED MARCH 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

JUDGMENT IN A CIVIL CASE

Jury Verdict. Following an order for summary judgment in favor of plaintiffs on the issue of liability, this action came before the Court for a trial by jury on the issue of damages. The jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the jury verdict entered on August 21, 1997, the plaintiffs are entitled to damages as follows:

Gilbert Copper	$1,000.00
Adele Norberg	$1,150.00

TOTAL JUDGMENT $2,150.00

March 31, 1998: Order Filed and Entered by Magistrate Judge Klein awarding attys' fees: $67,305 & costs: $2,097.94 – TOTAL JUDGMENT: $71,552.94

Dated: September 8, 1997

Edward J. Klecker
Clerk

by Deputy Clerk — Shelley M. Giauque

Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

(2)

No. 99-882

In The

Supreme Court of the United States

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure applies to an order denying a Rule 59(b) motion for a new trial intended to commence the time to appeal.

PARTIES TO THE PROCEEDING

The parties to the proceeding constitute the litigants to the appeal decided by the United States Court of Appeals for the Eighth Circuit. Each party appears below and includes the designation of either "Petitioner" or "Respondent".

Petitioners

Gilbert Copper (Appellee/Cross-Appellant)
Adele Norberg (Appellee/Cross-Appellant)

Respondents

City of Fargo (Appellant)
Kevin Niemann (Cross-Appellee)
Sherri Arnold (Cross-Appellee)

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Fargo, Kevin Niemann, and Sherri Arnold respectfully request that the Court deny the Petition for a Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals of July 22, 1999 is reported at *Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999).[1] *See* Petitioners' Appendix at A (hereinafter "Pet. App. A"). The District Court opinion in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. March 31, 1998), on Petitioner's motion for attorney's fees is unreported. The District Court opinion in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. April 10, 1997), on the cross motions for summary judgment prior to the second trial is unreported.

The District Court opinion of December 30, 1994, on the cross motions for summary judgment entered prior to the first trial is reported at *Copper v. City of Fargo*, 905

[1] At the same time the parties appeared for argument on *Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999), the parties also appeared for argument on a companion case, *Veneklase v. City of Fargo*, 1999 WL 1285777 (8th Cir. (N.D.)). In *Veneklase*, the Eighth Circuit addressed the constitutionality of Fargo's home picketing ordinance and ultimately held the same to be constitutional as a content-neutral ordinance enacted to protect the sanctity of the home. *See Veneklase v. City of Fargo*, 1999 WL 1285777 at *3-5.

F. Supp. 680 (D.N.D. 1994). The supplemental opinion of the District Court regarding municipal liability is reported at *Copper v. City of Fargo*, 905 F. Supp. 703 (D.N.D. 1995).

STATEMENT OF THE CASE

A. Facts Underlying The Claims Against Respondents.

On August 20, 1991, Sherri Arnold and Kevin Niemann, two police officers employed by Respondent City of Fargo, responded to a report of a fight outside an individual's residence in a south Fargo residential neighborhood. The officers arrived at the scene and observed a confrontation between abortion protestors picketing the home of a spokesperson for the local abortion clinic. After warning the picketers that arrests would occur if the individuals did not leave the area, and after the picketers refused to leave, the officers arrested the individuals, including Petitioners Gilbert Copper and Adele Norberg (hereinafter "Petitioners"), for violations of Fargo's home picketing ordinance. The state district court dismissed the criminal charges brought pursuant to the home picketing ordinance against Petitioners on constitutional grounds. Although that court found the residential picketing ordinance to be constitutional on its face, it found it to be unconstitutional as applied to Petitioners.

On August 18, 1993, Petitioners filed a Complaint in United States District Court, pursuant to 42 U.S.C. § 1983, naming the City of Fargo, and police officers Kevin Niemann and Sherri Arnold (hereinafter "Respondents"),

as defendants to the action. Petitioners alleged violations of the First and Fourteenth Amendments to the United States Constitution and sought damages against Respondents for Petitioners' arrest and incarceration.

B. Disposition Of The Case In The District Court.

On December 30, 1994, the District Court issued its opinion on the cross motions for summary judgment and dismissed all claims against Respondent Arnold based upon qualified immunity, leaving Respondents Niemann and the City of Fargo as remaining defendants. The District Court held that *Frisby v. Schultz*, 487 U.S. 474 (1988) protected Petitioners' activities and that Petitioners' constitutional rights may have been violated by Respondents Niemann and the City of Fargo. The District Court further determined that a fact issue remained. Therefore, the District Court left undecided whether Respondent Niemann was entitled to qualified immunity and whether Respondent City of Fargo was liable pursuant to 42 U.S.C. § 1983, pending resolution of the factual issue by a jury.

After the jury trial of January 10-13, 1995, and after having made the necessary factual determination, the jury awarded only nominal damages of one ($1) dollar to Petitioners and against Respondent Niemann and the District Court dismissed Respondent City of Fargo from the action. After the trial however, the District Court determined that an erroneous instruction had been given and signaled an intent to grant a new trial. On April 11, 1995, the District Court entered the Notice of Intent to Grant a New Trial. (Pet. App. D). On May 1, 1995, the

District Court entered a Clarification of Intent to Grant a New Trial. (Pet. App. E). The District Court **never** actually ordered a new trial.

On May 10, 1995, the District Court entered final Judgment pursuant to the jury verdict, dismissing Petitioners' claim against Respondent City of Fargo with prejudice and assessing damages of one ($1) dollar against Respondent Niemann. (Pet. App. F). On May 22, 1995, Petitioners timely filed a Motion for a New Trial pursuant to Rule 59(b).[2] On August 14, 1995, the District Court entered a document labeled "Order"[3] wherein the District Court denied Petitioners' Motion for a New Trial. (Pet. App. G).

On September 13, 1995, Petitioners' filed a Notice of Appeal, appealing the District Court's Order denying Petitioners' Motion for a New Trial entered on August 14, 1995. *See* Respondents' Appendix at A (hereinafter "Resp. App. A"). Thereafter on September 27, 1995, Petitioners and Respondents appeared before the District Court for a status conference wherein a discussion of possible new

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[2] Although Petitioners filed the Motion for a New Trial on May 22, 1995, twelve days after the entry of the Judgment, Petitioners satisfied the 10-day requirement of Rule 59(b) due to the inclusion of a weekend for purposes of determining when the 10-day period ran.

[3] In the Petition, Petitioners incorrectly label the Order denying Petitioners' Motion for a New Trial as a "Memorandum and Order". Respondents agree however, that the Order contained both legal reasoning as well as the following language: "IT IS HEREBY ORDERED: 1) Plaintiffs' motion for a new trial on damage issues only is denied." (Pet. App. G).

trial dates occurred. Petitioners subsequently withdrew the previously timely filed Notice of Appeal.

On April 10, 1997, the District Court ruled that Respondent City of Fargo's 1985 home picketing ordinance was unconstitutional as a content-based restriction of free speech pursuant to the Eighth Circuit decision in *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996). The District Court therefore held Respondent City of Fargo liable as a matter of law pursuant to that decision but dismissed Petitioners' claim against Respondent Niemann on qualified immunity grounds pursuant to the Eighth Circuit decision in *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996).

On August 21, 1997, the District Court held a second jury trial limited only to damages against Respondent City of Fargo. The jury awarded damages against said Respondent in the amount of one thousand dollars ($1,000) to Petitioner Copper and one thousand one hundred fifty dollars ($1,150) to Petitioner Norberg. The District Court entered the final Judgment on the second verdict on September 8, 1997. (Pet. App. H).

Thereafter, Petitioners moved the District Court for attorney's fees and costs. On March 31, 1998, the District Court awarded attorney's fees in the amount of sixty-seven thousand three hundred five dollars ($67,305.00) and costs in the amount of two thousand ninety-seven dollars and ninety-four cents ($2,097.94). *Id.* Respondent City of Fargo appealed to the Eighth Circuit Court of Appeals and Petitioners' cross-appealed against dismissed Respondents Arnold and Niemann.

C. Decision Of The Eighth Circuit Court Of Appeals.

On July 22, 1999, an Eighth Circuit panel issued an opinion wherein it concluded that the District Court lacked jurisdiction to proceed with a second trial as it failed to issue an order granting a new trial as required by Rule 59. (Pet. App. A at 1-10). The Eighth Circuit therefore reversed the entry of the second Judgment, leaving the May 10, 1995 Judgment intact. *Id.* at 10.

The Eighth Circuit addressed Petitioners' argument, a secondary issue, that the District Court's Order of August 14, 1995, denying the Motion for a New Trial, failed to constitute a final appealable order due to the failure to memorialize the order in a separate document in accordance with Rule 58. *Id.* at 7-8. The Eighth Circuit reasoned that the denial of a motion for a new trial, leaving a previous judgment unaffected, does not fall within the requirements of Rule 58 and that the District Court need not issue a new judgment or enter a separate written order. *Id.* The Eighth Circuit determined that the Judgment of May 10, 1995, duly entered by the clerk along with the Notice of Entry of Judgment, adhered to the requirements of Rule 58. *Id.*

On August 5, 1999, Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The Eighth Circuit denied the Petition on August 24, 1999 (Pet. App. B).

REASONS FOR DENYING THE WRIT

The Court should deny the Petition for a Writ of Certiorari for the following reasons. First, the Petition fails to present a significant federal question regarding the applicability of Rule 58 to Rule 59 new trial motions under the facts of the instant case. Second, a split in authority among the circuit courts of appeal does not appear to exist regarding the applicability of Rule 58 to Rule 59 new trial motions. Third, Petitioners timely filed the Notice of Appeal and thereby waived the separate document requirements of Rule 58, and further, the right to challenge the alleged failure of the District Court to adhere to said requirements, if applicable. Finally, a decision by this Court as to whether a separate document should have been entered after the Order denying the Petitioners' Motion for a New Trial will not affect the outcome of this case.

A. A Significant Federal Question Does Not Exist Under The Facts Of The Instant Case.

Petitioners suggest that uniform application of the Rule 58[4] separate document requirement to all post-judgment orders commencing the time to appeal would serve " 'to avoid unnecessary confusion, inefficient marshalling of judicial resources, and, most important, delays in

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[4] Rule 58 states in relevant part: "Subject to the provisions of Rule 54(b): "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See* Fed. R. Civ. P. 58.

obtaining or, possibly, actual loss of the right to, appellate review.' " *See* Petition at 10-11 (*citing Michael Zachary, Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y. Law School L.R. 409, 409 (1996)). Respondents agree that uniform application of Rule 58 may be appropriate as the rule exists to create greater certainty in establishing the time for which an appeal from a final judgment should lie.

Respondents disagree however, that this case provides the appropriate vehicle for the Court to consider the applicability of Rule 58 to **all** post-judgment orders. That is, the specific facts of the case, and the status of the law regarding the applicability of Rule 58 to Rule 59 new trial motions, do not warrant the same.

In *United States v. Indrelunas*, 411 U.S. 216, 220-22 (1973) *(per curiam)*, the Court held that the separate document requirement of Rule 58 must be "mechanically applied" to provide certainty as to when an order or a judgment[5] of a court becomes final. In *Indrelunas*, the district court entered the verdict forms on the docket following the conclusion of a jury trial with the following language: "[e]nter judgment on the verdicts. Jury discharged." *Id.* at 218. The district court did not enter a final judgment on the jury verdict for almost two years. *Id.* Under those circumstances, the Court required the entry of a separate document to "avoid . . . the uncertainties as to the date on which" the district court entered

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[5] Rule 54(a) provides in relevant part that " '[j]udgment' as used in these rules includes a decree and any other order from which an appeal lies." *See* Fed. R. Civ. P. 54(a).

judgment. *Id.* The *Indrelunas* Court therefore deemed the failure to enter a separate judgment following the jury verdict as non-compliance with the separate document requirement of Rule 58. *Id.* at 221-22.

In *Bankers Trust Company v. Mallis*, 435 U.S. 381, 383 (1978), the Court considered the issue of whether "a decision of a district court can be a 'final decision' for purposes of [appellate jurisdiction] if not set forth in a document separate from the opinion." Stated differently, the *Bankers Trust* Court considered whether the failure of a district court to enter a final judgment in accordance with Rule 58 automatically deprived an appellate court of jurisdiction. *Id.* The Court identified the "sole purpose of the separate document requirement" as the need for clarification of the commencement of the time for appeal under 28 U.S.C. § 1291.[6] *Id.* To that end, the Court stated that certainty as to timeliness "is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment." *Id.* at 385.

The *Bankers Trust* decision ultimately relaxed the requirements of Rule 58 when a party timely appeals, without objection from the adversary, from a judgment technically not final. *Id.* at 388; *see also Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F.2d 229, 235 (1st Cir. 1992). That is, a party should be deemed to have waived the separate document requirement of Rule 58 where the district court clearly evidenced an intent that an order be final from which an appeal could be taken,

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[6] 28 U.S.C. § 1291 provides that "courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." *See* 28 U.S.C. § 1291.

and where the party did not object to the taking of the appeal in the absence of the entry of a separate document. *Bankers Trust Co. v. Mallis*, 435 U.S. at 387-88.

In the instant case, the District Court entered the final Judgment following the jury trial and jury verdict on May 10, 1995. Both Petitioners and Respondent knew that each had either 30 days from entry of the final Judgment to appeal the same to the Eighth Circuit or, 10 days within which to bring an appropriate post-judgment motion to the District Court, such as a Rule 59 motion for a new trial. Petitioners filed a timely Motion for a New Trial with the District Court and the District Court issued and entered the Order denying the same. Petitioners then, within 30 days of that Order, filed a Notice of Appeal. Petitioners did not need clarification regarding the finality of the entry of the Order, the reason for the separate document requirement, and Petitioners timely filed the Notice of Appeal.

Under the reasoning in *Bankers Trust*, application of Rule 58 would appropriately be relaxed as Petitioners obviously understood the finality of the Order denying the Motion for a New Trial as Petitioners timely filed the appeal following the Order. For these reasons, this case does not present a significant federal question regarding the application of the separate document requirement to the Order in this case denying Petitioners' Motion for a New Trial, following entry of the final Judgment. Therefore, this case fails to provide the appropriate vehicle to determine whether an order on any post-judgment motion requires the filing of a separate document to avoid unnecessary confusion, inefficient marshalling of

judicial resources, or to avoid delay or actual loss of the right to appellate review.

B. A Split In Authority Among The Circuit Courts Of Appeal Does Not Appear To Exist As To The Application Of The Separate Document Requirement Of Rule 58 In The Context Of Rule 59(b) Motions.

Petitioners assert that a split in authority among the circuit courts of appeal exists regarding the application of the separate document requirement of Rule 58 to all post-judgment orders[7] of a district court. *See* Petition at 11. Petitioners argue that the opinion of the Eighth Circuit Court of Appeals as well as decisions from the Fifth, Seventh, and Eleventh Circuits, sit in "flat contradiction to leading cases in the First Circuit and D.C. Circuit", as well as an unpublished opinion of the Tenth Circuit. *Id.* at 16-19. Petitioners do however, acknowledge that a number of the other circuit courts of appeal have not squarely addressed the issue. *Id.* at 23-28.

At first glance it would appear that the decisions of the First, D.C., and Tenth Circuits directly contravene the decision of the Eighth Circuit in this case, however Respondents respectfully disagree. The applicability of Rule 58 to all post-judgment orders of a district court it is

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[7] As indicated in the first argument, Respondents disagree that this case provides the proper vehicle for the Court to consider the applicability of the separate document requirement of Rule 58 to all post-judgment orders as the facts of the case, as well as the circuit law regarding the applicability of Rule 58 to Rule 59(b) motions, does not warrant the same.

not the issue in the present case. The issue in this case relates to the applicability of Rule 58 to Rule 59(b) motions following proper entry of a final judgment. None of the cases cited by Petitioners squarely support the assertion that a split in the circuits exists. For the reasons set forth below, it does not appear a split in the circuits exists with respect to this question.

1. First Circuit Court Of Appeals.

In *Fiore v. Washington County Community Mental Health Center,* 960 F.2d 229-30 (1st Cir. 1992), the First Circuit considered the effects of a marginal notation in the docket of a denial of a Rule 60(b) motion following a previous decision on summary judgment. Although faced with consideration of the timeliness of an appeal from the denial of a Rule 60(b) motion, the court considered application of the separate document requirement of Rule 58 to motions brought pursuant to Rules 50(b), 52(b), 59(b) and (e) and Rule 60(b). *Id.* at 233-34.

The district court in *Fiore* merely entered a marginal notation on a copy of the summary judgment documents that had been docketed indicating that the court had denied the Rule 60(b) motion. *Id.* The First Circuit ruled, with respect to the timeliness of the Rule 60(b) motion, that the marginal notation on the summary judgment documents entered into the docket denying the motion, failed to comply with the Rule 58 separate document requirement. *Id.* Therefore, the *Fiore* court deemed the appeal to have been timely filed as a separate order had

not been entered to properly commence the time for appeal.[8] *Id.*

Any discussion by the First Circuit regarding the nature of the applicability of Rule 58 to motions brought pursuant to Rules 50(b), 52(b), or 59(b) and (e), constitutes dicta[9] and should not be deemed dispositive as to the suggestion that a split in the circuits exists. Moreover, even the First Circuit recognized that its holding did not necessarily contradict the holding in *Hollywood v. City of Santa Maria,* 886 F.2d 1228 (9th Cir. 1989), wherein the Ninth Circuit held that a district court need not issue a separate document following an opinion and order entered in response to a Rule 59 motion. *Id.* at 235 at FN 9.

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[8] The *Fiore* court denied the motion for summary judgment in March of 1990. *Id.* at 231. The appellant made the Rule 60(b) motion, which the district court denied on June 27, 1990, by means of a marginal notation on a copy of the summary judgment documents previously docketed. *Id.* On October 22, 1990, the district court then entered a memorandum and order holding that the finality of the June 27 decision would be a matter for the First Circuit to consider when and if an appeal occurred. *Id.*

[9] Respondents acknowledge that the opinion of the First Circuit related to the applicability of the separate document requirement of Rule 58 to Rule 50(b), 52(b), and 59(b) and (e) did not occur fortuitously or that it constitutes "inconsequential" dicta as the court received reasoned analysis through amici curiae. However, for purposes of this case, Respondents assert that such reasoning should not be deemed dispositive for determining whether a split in authority among the circuits exists on this specific issue.

Due to *Fiore* having directly decided the appropriate application of Rule 58 to a Rule 60(b) motion only, and that the First Circuit did not necessarily deem its specific decision as contrary to the holding in *Hollywood*, it does not appear that the *Fiore* case properly identifies a split in authority among the circuits as to the application of Rule 58 to Rule 59(b) motions. That is, it does not properly identify a split when a judgment has been properly entered and where a district court denies a Rule 59(b) motion leaving the original final judgment unaffected. Therefore, the Court should not consider it when determining whether a split in authority exists for purposes of determining whether the Petition should be granted.

2. D.C. Circuit Court Of Appeals.

In *Diamond v. McKensie*, 770 F.2d 225, 226 (D.C. Cir. 1985), the D.C. Circuit considered whether a district court order requiring the defendants to the action to place a child in a residential educational facility constituted the final order from which the time to appeal began to run. The order stated that "the [c]ourt will file a [m]emorandum [o]pinion setting forth the reasons for its decision" and that "this [o]rder shall constitute the final order of the [c]ourt." *Id.* Prior to the district court entering its memorandum and order, the appellants filed a Rule 60(b) motion for relief from the initial order. *Id.* The district court did not respond to the motion. *Id.* One month after the initial order, the district court filed its memorandum opinion. Eight days after the issuance of the memorandum opinion, the appellants filed a notice of appeal. *Id.* at 226-27.

The D.C. Circuit concluded that the initial order did not constitute the final order from which the time to appeal began to run, but rather that the memorandum and opinion entered one month later did. *Diamond v. McKensie*, 770 F.2d at 231. The court cited the importance of the separate document requirement of Rule 58 "to avoid speculation as to whether an appellant should or should not have known that the time for appeal had begun to run." *Id.* at 230.

Like *Fiore*, the Rule 58 separate document analysis in *Diamond* did not occur as a result of a jury trial having taken place and a judgment on the verdict having been entered, like in the instant case. It likewise did not occur as a result of the district court having issued an order denying a Rule 59 motion for a new trial, like in the instant case. Moreover, the D.C. Circuit deemed the requirements of Rule 58 to have been satisfied with the entry of the memorandum and opinion, a document that contained legal reasoning and analysis as well as an order of the court, the same type of Rule 59(b) order entered in this case. *Id.* at 230. Therefore, *Diamond* clearly fails to identify a split in the circuit courts of appeal related to the application of the separate document requirement of Rule 58 to Rule 59(b) motions.

3. Tenth Circuit Court Of Appeals.

In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997) *(unpublished opinion)*, the Tenth Circuit, in an unpublished opinion, appears to follow the reasoning and analysis set forth by the First and D.C. Circuits regarding the application of the separate document

requirement of Rule 58. In *Woods*, the plaintiff appealed from an order of the district court denying a motion to remand several state claims following dismissal on summary judgment of the federal causes of action four months earlier. *Id.* at *1.

The district court summarily denied the motion in a minute order entered on the docket on July 3, 1996. *Id.* The plaintiff filed a notice of appeal on August 5, 1996, outside the 30-day period for appeal specified in Rule 4 of the Federal Rules of Appellate Procedure. *Id.* The plaintiff alleged two reasons for the late appeal. *Id.* The plaintiff argued that the court failed to execute a separate document in compliance with Rule 58 and that the plaintiff never received notice of entry of judgment although an inquiry had been made on numerous occasions regarding the same. *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 at *1.

The Tenth Circuit opined that "[an] order effecting the challenged disposition may itself constitute the requisite 'separate document'". *Id.* (*citing Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992)). It reasoned that the minute order entered by the court wherein the court denied the post-judgment motion indeed satisfied the requirements of Rule 58. *Id.* Therefore, the Tenth Circuit deemed the plaintiff's appeal untimely although it ultimately allowed the appeal to proceed pursuant to the "unique circumstances" exception of Rule 77(d). *Id.*

Like *Fiore* and *Diamond*, *Woods* fails to identify a split in the circuits regarding the applicability of the separate document requirement of Rule 58 to Rule 59(b) motions. Therefore, the Court should, like with *Fiore* and *Diamond*,

not consider *Woods* for the purpose of determining whether a split among the circuit courts of appeal exists on this issue.

4. The Fifth, Seventh And Eighth Circuits Appear To Be The Only Circuits To Have Considered Whether The Separate Document Requirement Of Rule 58 Applies To Rule 59(b) Motions When A Final Judgment Was Previously Entered.

Although the various circuits have had difficulty with the applicability of the separate document requirement of Rule 58 to orders entered on post-judgment motions, it appears that only the Fifth, Seventh and Eighth Circuits[10] have considered the issue with respect to a Rule 59(b) motion for a new trial. These circuits have held that a separate document need not be entered to comply with Rule 58. As such, it appears that a split in authority among the various circuits on this specific issue, the issue in the instant case, does not exist.

In *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994), the case relied upon by the Eighth Circuit in this

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[10] Petitioners cite the Eleventh Circuit case of *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), as one of the cases which do not apply the separate document requirement of Rule 58 to post-judgment motions. *See* Petition at 22. Respondents have not included any analysis regarding this case as it dealt with the applicability of the separate document requirement of Rule 58 to a Rule 59(e) motion to alter or amend judgment wherein the court did not require a separate document when the district court amends a previous judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d at 1588.

case, the Fifth Circuit considered whether the separate document requirement of Rule 58 applied to an order denying a Rule 59(b) motion for a new trial.[11] In *Marre*, the district court entered a final judgment and the appellants filed a Rule 59(b) motion for a new trial. *Id.* The district court denied the motion in a written minute entry, entered on the docket, but did not issue a written order as to the same. *Id.*

The appellees asserted that the district court's failure to enter a separate order denying the motion for a new trial rendered the appeal premature under Rule 58. *Id.* The *Marre* court disagreed however, and ruled that "[w]hile Rule 58 clearly requires the entry of a separate, written order, courts generally distinguish between the granting of a post-trial motion and the denial of a post-trial motion." *Id.* The court went on to reason that "[w]hen the court grants a post-trial Rule 59 motion, it affects the judgment, and its new ruling becomes the final judgment. As such, Rule 58 requires a written order. By contrast, the denial of a post-trial [Rule 59] motion leaves the pre-existing judgment unaffected." *Marre v. United States*, 38 F.3d at 825. Therefore, no need exists to issue a new judgment.[12] *Id.*

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[11] The *Marre* court also considered the applicability of Rule 58 to a Rule 59(e) motion to alter or amend judgment as the Government jointly presented the motions to the district court. *Id.*

[12] The court noted that "the Seventh, Ninth and Eleventh Circuits have recognized this distinction and do not require a separate, written order for the denial of a post-trial motion." *Id.*

In *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1229 (9th Cir. 1989), the district court entered judgment on a jury verdict for the defendant and orally denied the plaintiff's motion for a new trial brought pursuant to Rule 59(b). *Id.* The plaintiff filed the first notice of appeal and the district court subsequently filed a written order denying plaintiff's motion for a new trial. *Id.* The plaintiff then filed a second notice of appeal following entry of the written order. *Id.* at 1229-30.

The order denying the new trial consisted of a nine-page document explaining the legal and factual basis for the court's decision to deny the motion. *Id.* The court titled the document "Order Denying Plaintiff's New Trial Motion". *Hollywood v. City of Santa Maria*, 886 F.2d at 1229. The order concluded with the statement "THEREFORE, plaintiff's motion for a new trial is DENIED. IT IS SO ORDERED." *Id.* The court subsequently served the parties with the notice of entry. *Id.*

The appellant argued that, pursuant to Rule 58, the district court should have filed, in addition to the nine-page order, a separate, one-sentence order stating that the motion had been denied. *Id.* at 1231. The Ninth Circuit disagreed, deeming the entry of the order with the appropriate notations proper and in compliance with Rule 58. *Id.* To that end, the court stated that "[n]either precedent nor logic . . . compels us to hold that entry of such an order is ineffective to trigger the time for filing a notice of appeal simply because the order contains explanatory material." *Hollywood v. City of Santa Maria*, 886 F.2d at 1231.

In *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 317-18 (7th Cir. 1993), the Seventh Circuit considered whether an order denying a motion for a new trial, or in the alternative, a motion to alter or amend the judgment, complied with the requirements of Rule 58. After the entry of judgment and the submission of the Rule 59(b) and (e) motions, the district court issued an opinion stating that the judge would deny the motion for a new trial and for relief from the judgment and impose sanctions. *Id.* at 317. The district court later issued its opinion regarding the imposition of sanctions but made no mention of the rulings on the Rule 59(b) and (e) motions. *Id.*

The *Chambers* court recognized that in *Charles v. Daley*, 799 F.2d 343, 344 (7th Cir. 1984), it had held that the separate document requirement of Rule 58 did not apply to orders denying post-trial motions, and therefore a separate document need not be entered following such a denial. *Id.* Although at first glance it does not appear as though the *Chambers* court followed the reasoning set forth in *Charles*, closer scrutiny of the facts in *Chambers* indicates otherwise. *Id.* at 318.

Although the Seventh Circuit in *Chambers* acknowledged that it did not require the entry of a separate document following the denial of a post-trial motion in *Charles*, the facts in *Chambers* warranted such an entry. *Chambers v. American Trans Air, Inc.*, 990 F.2d at 318. The district court, in its initial order denying the Rule 59(b) and (e) motions, indicated that a separate order would be issued on the denials. *Id.* The district court then issued the order granting sanctions but without reference to the denial of the other post-trial motions. *Id.* As the *Chambers* court indicates, the litigants would not clearly have

known when the time for filing of an appeal had began to run due to the ambiguity created by the district court.[13] *Id.* Therefore, the Seventh Circuit deemed appellate jurisdiction to be proper. *Id.*

The cases cited above from the Fifth, Seventh and Ninth Circuits, as well as the Eighth Circuit decision at issue in the case, appear to be the only circuit cases wherein the circuit courts have addressed the issue of the applicability of the separate document requirement of Rule 58 to a motion for a new trial brought pursuant to Rule 59(b). Each of these circuits have held that such a separate document need not be entered to comply with Rule 58. As such, it appears that a split in authority among the various circuits on this specific issue does not exist therefore warranting review by this Court.

C. Petitioners Waived The Requirements Of Rule 58 When Petitioners Timely Filed The Notice Of Appeal After The First Jury Trial.

Petitioners allege that the failure to create and enter a separate document after the denial of Petitioners' Motion for a New Trial could have resulted in confusion, judicial

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[13] To this end, the Seventh Circuit stated: "[a]s this case illustrates, district judges must take care, in crafting post-judgment orders, to avoid creating ambiguities concerning the finality and hence appealability of the orders. Such ambiguities create additional work for litigants and for this court; worse, [these ambiguities] can deprive litigants of [the] right to appellate review of adverse judgments. An equal responsibility rests on counsel to seek clarification of ambiguous orders in order to protect [the] client's right to appeal." *Id.*

inefficiency, delays in obtaining, or actual loss of, the right to appellate review. In this case however, any failure by the District Court to enter a separate document after entry of the Order denying Petitioners' Motion for a New Trial did not result in any of the above, especially loss of appellate review, as Petitioners timely filed the Notice of Appeal.

As the leading case cited by Petitioners to support the assertion that a separate document is required, a litigant may be deemed to have waived the requirements of Rule 58 if that litigant successfully files a timely appeal. *See Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F.2d 229, 236 at FN 10 (1st Cir. 1992). Likewise, a litigant may waive the technical application of the separate document requirement of Rule 58. *Id.* at 236. The *Fiore* court reasoned as it did pursuant to the landmark Supreme Court decision in *Bankers Trust Company v. Mallis*, 435 U.S. 381, 387-88 (1978). *Id.*

In this case, Petitioners waived the requirements of Rule 58 when Petitioners perfected an appeal with the filing of the Notice of Appeal. By filing the Notice of Appeal, Petitioners' effectively waived the technical application of the separate document requirement of Rule 58 to the denial of Petitioners' Motion for a New Trial, if it indeed applies. As a result, Petitioners cannot now assert that the District Court failed to adhere to the separate document requirement and that such a failure entitles Petitioners to relief from this Court. As indicated, the purpose behind requiring the entry of a separate document under Rule 58, is to inform the litigant that the time to appeal has begun to run. However, "Rule 58 is not enforced in strictly literal fashion if there is no question

about finality." *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 at *2 (10th Cir. 1997).

Obviously Petitioners believed that the time to appeal had begun to run when the District Court entered its Order denying the Rule 59 Motion due to Petitioners having filed the Notice of Appeal exactly thirty (30) days after the District Court entered the Order. Likewise, Petitioners did not suffer any confusion, delay in, or loss of, the right to appeal as Petitioners filed a timely appeal. Finally, Petitioners knew the requirements for filing the appeal and waived any claim under Rule 58 that may have existed regarding the sufficiency of the entry of the Order denying the Motion.

D. A Decision By This Court As To Whether A Separate Document Should Have Been Entered After The Order Denying The Petitioners' Motion For A New Trial Will Not Affect The Outcome Of This Case.

Petitioners assert that the Court should grant the Petition because the District Court did not enter a separate document following the Order denying Petitioners' Motion for a New Trial. Petitioners further assert that, as the District Court never entered a separate document following the entry of the Order denying the Motion, the court failed to issue a final order in the case. Finally, Petitioners suggest that the District Court, in entering the Order denying the Motion, did not intend for that Order to be a final order, but rather the District Court intended to have a second trial on its own terms even though it never entered an order regarding the same. The second

trial did eventually occur,[14] resulting in the underlying appeal to the Eighth Circuit.

The Eighth Circuit decision, on which Petitioners now seek a Writ of Certiorari by this Court, held against Petitioners. The Eighth Circuit did not however, hold against Petitioners on the grounds that a timely appeal had not been filed nor because the District Court failed to enter its Order denying Petitioners' Motion for a New Trial on a separate document. Rather, the Eighth Circuit held that error occurred when the District Court failed to enter an order granting a new trial. Petitioners have not presented this issue to the Court.

Accordingly, even if this Court decided that a separate document should have been entered by the District Court following the Order denying Petitioners' Motion for a New Trial, that holding would not alter the Eighth Circuit's decision. That is, the fatal flaw still exists, in that the District Court never issued an order granting a new trial. As a result, the District Court did not have jurisdiction to conduct the second trial.

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[14] The fact that Petitioners and Respondents continued with the proceedings subsequent to the May 10, 1995 judgment, does not constitute a waiver of the requirement of an order for a new trial and does not confirm jurisdiction on the district court. *See Nugent v. Yellow Cab Co.*, 295 F.2d 794 (6th Cir. 1961), *cert. denied*, 369 U.S. 828 (1961).

CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Dated: February 16, 2000

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX A – PETITIONERS' NOTICE OF APPEAL FILED SEPTEMBER 13, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg, Plaintiffs, v. City of Fargo, Kevin Niemann, and Sherri Arnold, Defendants.	)	Civil No: A3-93-130 **NOTICE OF APPEAL**

Notice is hereby given that Plaintiffs Gilbert Copper and Adele Norberg hereby appeal to the United States Court of Appeals for the Eighth Circuit from the District Court's Order denying Plaintiffs' Motion for a New Trial entered in this action on the 14th day of August, 1995.

DATED this 13th day of September, 1995.

Thomas W. Condit
Trial Attorney for the Plaintiffs
Kenwood Professional Building
9403 Kenwood Road, Suite C208
Cincinnati, Ohio 45242
(513) 985-9333

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served via regular U.S. Mail upon Mike Miller, Attorney for Defendants, 1129 Fifth Avenue South, P.O. Box 1897, Fargo, North Dakota, 58107-1897 this 12th day of September, 1999.

Thomas W. Condit, Attorney

(3)

No. 99-882

Supreme Court, U.S.
FILED
MAR 02 2000
CLERK

In The
Supreme Court of the United States

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

On or about February 16, 2000, Respondents City of Fargo ("City"), Kevin Niemann, and Sherri Arnold filed a Brief in Opposition ("Opp. Brief") to the Petition for a Writ of Certiorari. Pursuant to Supreme Court Rule 15.6, Petitioners Gilbert Copper and Adele Norberg address the new points raised by Respondents.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioners believe that Respondents mischaracterized some of the picketing events which underlie this dispute. However, because the specific events are not relevant to the Rule 58 issues presented in the Petition, Petitioners will refrain from further comment on those points.

On the other hand, it is important for Petitioners to correct one serious misstatement in Respondents' brief regarding the procedural history of this case. Respondents stated that the Petitioners filed a Notice of Appeal in response to the District Court's Order on August 14, 1995, and that they "subsequently withdrew the previously timely filed Notice of Appeal." Opp. Brief at 4-5. Such a statement is absolutely false. The first Notice of Appeal filed in this action was filed by the City on April 22, 1998 (District Court Dkt. No. 143) in response to the final Judgment and attorney fee award by the District Court on March 31, 1998. Petition, App. H.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

Respondents concede two significant points:

1. The District Court order of August 14, 1995 (Petition, App. G), which is the focus of the Rule 58 issue presented for review to this court, "contained both legal reasoning as well as" an order. Opp. Brief at 4 n.3. Thus, Respondents concede that the order at issue was not set forth on a separate document.

2. Uniform application of Rule 58 to post-judgment orders would be desirable. "Respondents agree that uniform application of Rule 58 may be appropriate as the rule exists to create greater certainty in establishing the time for which an appeal from a final judgment should lie." *Id.* at 8.

Respondents, however, make three arguments that this case is an inappropriate vehicle for this Court to establish a uniform rule for applying the separate document requirement of Rule 58 to post-judgment orders. All three arguments are flawed, as explained point by point below.

I. Petitioners did not waive the Rule 58 separate document requirement by filing an abortive appeal from the August 14, 1995 order.

Appendix 1 of Respondent's Opposition Brief consists of a Notice of Appeal captioned in the United States District Court for the District of North Dakota and dated September 13, 1995. However, the District Court docket sheet for this case does not record the filing of the Notice of Appeal. See Appendix A to this Reply Brief. Therefore, this Court must disregard it.

"This Court must affirm or reverse upon the case as it appears in the record[.]" *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481, 489 n. 3 (1986). "We can not look out of [the record] for testimony to influence the Judgment of this court sitting as an appellate tribunal." *Russell v. Southard*, 12 How. 139, 159 (1851). *See also New Haven Inclusion Cases*, 399 U.S. 392, 450, n. 66 (1970) (Court refuses to consider newspaper articles not in the record.); *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157-158, n. 16 (1970) (court refuses to consider statement of witness not found in trial court record).

However, in the event that this Court would for any reason consider the Notice Of Appeal which appears in Respondents' Appendix, Petitioners submit the following commentary for consideration. It is true that the Petitioners came very close to filing a Notice of Appeal in September, 1995, going so far as to serve it on the City's Attorney before they changed course and decided not to file it at all. The Petitioners spent no small amount of time wavering on whether an Appeal should be filed, whether it would be considered premature, and whether some important issues would be waived by filing an appeal (or by not filing an appeal) at that time. With the District Court having stated in its order that it had already granted a new trial on terms different from the relief sought by Petitioners (*i.e.*, granting Petitioners' request for a new trial against the City but denying a "damages only" trial against Niemann), Petitioners were faced with the kind of uncertainty which the Rule 58 separate document requirement is designed to eliminate, all of which only reinforces the need for clarification by this Court of mandatory post-trial procedure in the district courts.

However, even had Petitioners filed and withdrawn the Notice of Appeal, Respondents' "waiver" argument would still lack merit. In *United States v. Indrelunas*, 411 U.S. 216 (1973), the seminal case on the application of the separate document requirement of Rule 58 to questions of appealability, this Court addressed the identical objection raised by Respondents and rejected it. Petitioner in that case had taken an abortive appeal from a filed stipulation for damages prior to the entry of a formal judgment. This Court stated:

> The Court of Appeals appears to have been motivated in its conclusion, at least in part, by what it felt to have been the capricious conduct of the Government in first seeking to appeal following the filing of the stipulation for damages, and then later insisting that at that time there had been no judgment which it could have appealed from.

Id. at 221. This Court rejected such an argument for waiver precisely because, if accepted, it would vitiate the effectiveness of a mechanical application of the separate document requirement for purposes of establishing appellate jurisdiction.

> But whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the "separate document" provision of Rule 58 is one of them.

Id. Respondents' waiver-by-abortive-appeal argument, being identical to that rejected in *Indrelunas*, requires no further comment.

II. The Rule 58 issue presented in the petition is not academic.

A. Resolution of the separate document question in favor of Petitioners would permit the lower courts to address the merits of Petitioners' constitutional claims, and/or to order a new trial.

If this Court grants the writ and determines that the Rule 58 separate document requirement applies to orders denying post-trial tolling motions, then the Eighth Circuit erred when it concluded that the District Court lost jurisdiction in 1995. Instead, the District Court retained its jurisdiction throughout the second trial and until it entered final judgment on a separate document on March 31, 1998. Petition, App. H. Consequently, upon remand the Eighth Circuit will have to consider the effect of the 1997 (second) trial on its merits, order a new (third) trial, or remand the case to the District Court for other appropriate proceedings.

When an appellate court remands a case for lack of compliance with Rule 58, a party can still "attempt to persuade the district court to reconsider" the underlying ruling. *Kersey v. Dennison Manufacturing Co.*, 3 F.3d 482, 485 (1st Cir. 1993). If Rule 58 is not satisfied, claims in the case "remain open until finally disposed of by the district court in a separate document." *Willhauck v. Halpin*, 919 F.2d 788, 793 (1st Cir. 1990). Thus, the Eighth Circuit order to vacate the second judgment and reinstate the first one would itself have to be vacated for consideration of further action on the merits. As the First Circuit stated:

> On remand, the lower court must consider whether it desires to change any of the previously entered interlocutory orders. After making its desired

> changes, if any, it is directed to enter final judgments disposing of the entire litigation in accordance with the Federal Rules of Civil Procedure.

Willhauck at 794.

B. The Eighth Circuit's focus on the absence of a formal Rule 59 order distracted it from attending to the formal Rule 58 separate document requirement.

Petitioners submit that the Eighth Circuit panel lost its focus on the critical issue when it diverted its attention to the absence of a new trial order, concluding:

> The district court lost jurisdiction to further litigate this case. The district court and the parties cannot waive the requirements of Rule 59. *See Nugent v. Yellow Cab Co.*, 295 F.2d 794 (7th Cir. 1961).

Petition, App. A at p. 8.

Hitching their wagon to the Eighth Circuit's reasoning, and also citing *Nugent*, Respondents argued that Petitioners "have not presented" to this Court the issue of the District Court's "fail[ure] to enter an order granting a new trial." Opp. Brief at 24 n.14.

Petitioners did not present the Rule 59 issue to this Court for a good reason: it is *not* the dispositive issue. The whole point of their Petition is that regardless of any defect or omission in the District Court's entries relating to the new trial motion, entries which could have been cured or clarified at any time at the request of a party, the District Court could not have lost jurisdiction in 1995 because it never properly entered a final appealable order in response to the new trial

motion. Indeed, the Eighth Circuit's citation to *Nugent* is curiously off point. The *Nugent* plaintiff failed to file her post-trial motions within the time allowed by the Civil Rules. Therefore, the time for appeal expired in *Nugent* and jurisdiction was lost, a reality which could not be waived by the parties. Petitioners *agree* with that result. In this case, by contrast, Petitioners filed a timely post-judgment motion which continued jurisdiction in the District Court, and which was never properly resolved, for appeal purposes, under Rule 58.

Petitioners are not claiming that jurisdiction can be waived when it was lost. Rather, they are asserting that under Civil Rule 58 the District Court never lost jurisdiction in the first place. If any waiver happened in this case, it was the City's waiver of any objection to a defective new trial order. Without ever suggesting that jurisdiction had been lost and without arguing that a second trial had not been ordered, Respondents took part in a second trial in August 1997. The District Court subsequently entered judgment on the jury verdict and awarded attorney fees on a separate document – a final appealable order. Petition, App. H. Only when the City filed its Notice of Appeal on April 22, 1998, did the District Court finally lose jurisdiction of the case.

C. The companion case is still being litigated.

Finally, this Court must not be misled (Opp. Brief at 1 n.1) into thinking that the Eighth Circuit's decision in *Veneklase v. City of Fargo*, 200 F.3d 1111 (8th Cir. 1999), moots the constitutional issues in this case. Not only are the two cases factually and legally distinguishable because of differences in the picketing routes, but on February 16, 2000, the Eighth Circuit granted rehearing en banc to review further the facial constitutionality issues decided in

Veneklase.[1] 2000 U.S. App. LEXIS 2255. The merits of this case are still very much in play.

III. This case is a proper vehicle for establishing a uniform rule for application of the separate document requirement of Rule 58 to post-judgment orders which commence the time for appeal.

A. Conflict with this Court's precedent and plain language of Appellate Rule 4(a).

Petitioners presented two reasons for granting the writ, the first of which Respondents do not address at all, and indeed concede, namely that the petition raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). Respondents argue, however, that the Fifth, Seventh, Eighth, and Ninth circuits do not require a separate document when entering an order denying a motion for new trial under Civil Rule 59(b), and that no other circuits have made an express holding requiring a Rule 58 separate document when denying a Rule 59(b) motion. Thus, Respondents contend there is no circuit split, and no need for review by this Court. They overlook, however, the obvious point that by their own count at least four circuits have waived this Court's requirement for "mechanical" application of the separate document requirement to fix the time when appeals commence to run. Such decisions are also in plain conflict with Appellate Rule 4(a), which clearly requires application of Rule 58 to post-judgment orders which restart the appeal clock. *See* Petition for Writ of Certiorari at 13-15.

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[1] Counsel for Petitioners in this case are also counsel for the plaintiffs in *Veneklase*, where they moved for en banc review because of the direct conflict between the *Veneklase* panel decision and *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996).

Thus, the refusal of four of the circuits to observe the mechanical requirements for starting the appeal clock is ample reason of itself for this Court to address and resolve the issue, regardless of the of a split in the circuits.

B. A considerable number of circuits are in conflict.

Respondents want this Court to take a myopic view of the issue in order to conclude that there is no conflict in the circuits. The First Circuit, however, regardless of whether the global issue was strictly before it, made a blanket ruling, with the aid of appointed amici, that Rule 58 applies "to all final orders denying and, *a fortiori*, granting post-judgment motions under Rule 50(b), 52(b), 59(b) and (e), and 60(b)." *Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F. 2d 229, 234 (lst Cir. 1992) (*en banc*). This ruling was not dictum, but imposed a uniform rule of procedure which all district courts in the First Circuit are required to observe.

The D.C. Circuit, also with the aid of appointed amici, expressly allied itself with the First Circuit in regard to Rule 60(b) motions (except for *Fiore*'s 3-month limit), and indicated that all orders on Rule 4(a)(4) tolling motions should observe Rule 58, citing Appellate Rule 4(a)(7). *U.S. v. Haynes*, 158 F.3d 1327, 1330-1331 (D.C.Cir. 1998). In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997) (*unpublished opinion*), the Tenth Circuit stated that it had previously applied Rule 58 "to the denial of a new trial motion," citing *Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), and, citing *Fiore*, ruled generally that "[b]ecause the underlying principles are closely analogous," there is good reason "to adopt a uniform approach for all orders denying post-judgment motions." *Fiore*, 960 F.2d at 232. By any fair

reading, the First, Tenth, and D.C. Circuits are in conflict with the Fifth, Seventh, Eighth, and Eleventh Circuits on application of Rule 58 to denial of post-trial tolling motions.

C. Other circuits are in confusion.

The Ninth Circuit has one panel precedent requiring application of Rule 58 to orders denying a motion for a new trial, *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454 (9th Cir. 1989), and a later panel opinion denying such a requirement. *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989). The Second and Sixth Circuits also have contradictory precedent. *See* Petition at 23-28.

IV. Conclusion.

For the above-stated reasons, this case provides an appropriate opportunity to establish a "bright line" rule for application of Rule 58's separate document requirement to all post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1). Certiorari should be granted in the interest of resolving this important federal question governing the timeliness of appeals, Supreme Court Rule 10(c), and to resolve the conflict and confusion in the circuits. Supreme Court Rule 10(a).

Respectfully submitted,

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APPENDIX

APPENDIX A – PARTIAL DOCKET SHEET OF CIVIL NO. A3-93-130 (D.N.D.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil No. A3-93-130

Gilbert Copper and Adele Norberg,

Plaintiffs,

v.

City of Fargo et al.,

Defendants.

. . .

8/14/95 84

ORDER by Hon. Karen K. Klein with NOTICE OF ENTRY: granting motion for leave to file reply br [83-1], granting motion to strike juror afdt [79-1], granting motion to ext time for appl atty fee [78-1], denying motion for new trial on damages issues only [77-1] (cc: all counsel) (lj)

8/14/95 85

REPLY BRIEF by plaintiff to defts response to Motion for New Trial and to Alter Judgment. (lj)

9/27/95 86

CLERK'S MINUTES: of status confr re: trial date before Hon. Karen K. Klein; discussion re: possible trial dates - pties & crt settled on 1/29/96 if case presently set then settles - crt will notify counsel soon. A pretrial confr will be held by tel approx 10 days prior to trial date - pltf may likely file mtn to bifurcate. Recess. (lj)

10/2/95 87

ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 1/16/96 by tel. conf. initiated by crt at 10:30 (cc: all counsel) (jo) [Entry date 10/03/95]

10/2/95 88

NOTICE of Setting: Jury trial scheduled for 1/29/96 at 9:30 in Fgo bef. Mag. Klein; est. 4-5 days; (cc: all counsel, court officials) (jo) [Entry date 10/03/95]

12/27/95 89

MOTION by plaintiff, defendant to continue trial date (lj)